(10)

No. 90-1074-CFH
Status: GRANTED

Title: Wayne Estelle, Warden, Petitioner
v.
Mark Owen McGuire

Docketed:
December 17, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Gillette,Dane R.

Counsel for respondent: Voris,Ann Hardgrove

Petition was returned by mistake (the original didn't conform w. Rule 33, but the remaining copies did); 40 copies recd. again 1/4/91.

Entry	Date	Note	Proceedings and Orders
1	Dec 17 1990	G	Petition for writ of certiorari filed.
3	Feb 4 1991	X	Brief of respondent Mark Owen McGuire in opposition filed.
4	Feb 4 1991	G	Motion of respondent for leave to proceed in forma pauperis filed.
2	Feb 6 1991		DISTRIBUTED. February 22, 1991
5	Feb 25 1991		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Feb 25 1991		Petition GRANTED.
			**********
7	Mar 4 1991	G	Motion of respondent for appointment of counsel filed.
8	Mar 11 1991		DISTRIBUTED. MARCH 15, 1991.
9	Mar 18 1991		Motion for appointment of counsel GRANTED and it is ordered that Ann Hardgrove Voris, Esq., of San Francisco, California, is appointed to serve as counsel for the respondent in this case.
10	Apr 10 1991		Joint appendix filed.
11	Apr 10 1991		Brief of petitioner Wayne Estelle, Warden filed.
12	Apr 11 1991		Brief amicus curiae of Criminal Justice Legal Foundation filed.
19	Apr 11 1991		Brief amicus curiae of United States filed.
14	Apr 30 1991		Order extending time to file brief of respondent on the merits until June 10, 1991.
15	May 10 1991		Brief amici curiae of National Association of Criminal Defense lawyers, et al. filed.
16	Jun 7 1991		Brief of respondent Mark Owen McGuire filed.
18	Jul 2 1991		Reply brief of petitioner Wayne Estelle, Warden filed.
20	Jul 15 1991		CIRCULATED.
21	Jul 19 1991		SET FOR ARGUMENT WEDNESDAY, OCTOBER 9, 1991. (1ST CASE)
22	Aug 16 1991		Record filed.
		*	Received record (not certified) from USCA 9.
23	Oct 9 1991		ARGUED.

EDITOR'S NOTE

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90-1074

No.

FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN

Petitioner,

v.

MARK OWEN McGUIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit improperly expanded its habeas corpus jurisdiction and found a due process violation by interpreting state law and reversing an evidentiary ruling which the state courts held to be correct as a matter of state law.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN

Petitioner,

v.

MARK OWEN McGUIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed May 4, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 902 F.2d 749 (1990). A copy of the opinion is attached to this petition as Appendix A. An earlier opinion, reported at 873 F.2d 1323 (1989), was filed on May 8, 1989, and withdrawn on

April 23, 1990. A copy of that opinion is attached as Appendix B. The order of the District Court denying the petition for writ of habeas corpus was not reported. It appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 4, 1990. Rehearing and rehearing en banc were denied, with two circuit judges dissenting, on November 23, 1990. That order, along with the dissenting opinion, is attached as Appendix D. This petition for writ of certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part: "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT

A. Factual Background

Respondent, Mark McGuire, was convicted in Alameda County Superior Court on one count of second degree murder, a violation of California Penal Code section 187. He was sentenced on May 12, 1982, to state prison for the statutory term of fifteen years to life.

Respondent and his wife, Daisy, brought Tori Aurora McGuire, their six-month old child, to the emergency room on July 7, 1981. She was bluish in color, not breathing, and had bruises on her body. Respondent told the emergency room nurse that Tori had recently had a cold and had hit her head that morning falling off a couch.

While the doctors were treating Tori, Daisy and respondent waited near the emergency room screening area. Daisy asked him what had happened. Respondent replied that he was upstairs and "guessed" that Tori had fallen off the couch. Daisy continued to ask what had really happened, but received the same answer. She reminded respondent that Tori was all right when Daisy left the house and insisted that he was responsible for the child's situation. This conversation was overheard by another woman in the waiting room who testified at the trial.

When Tori reached the emergency room she was lifeless. She had a large recent bruise on her upper left chest with multiple bruises around it. She also had marks on her ears and scar tissue indicative of a tearing wound

to the rectum. The child died about forty-five minutes after arriving at the hospital.

An autopsy revealed at least seventeen contusions on Tori's chest and twenty-nine more to her abdominal area. They were fresh and indicated a blow from a hand. A number of internal organs were lacerated or torn. Only the application of a great deal of blunt force could have caused the injuries. An x-ray examination revealed several partially healed rib fractures.

The emergency room physician who treated Tori and the pathologist both concluded that she was a battered child. They agreed a fall from a couch could have caused none of her injuries, even if she struck an object in the process.

The police investigated these unexplained injuries. During a brief interview at the hospital, respondent said that he put Tori on the couch and then went upstairs. He heard her crying and when he came back, found Tori lying on the floor. He thought that she might have fallen and struck the walker.

An officer later accompanied respondent and Daisy to their apartment. The officer had seen the bruises on the victim and noted that it was a sixteen inch drop from the couch to the carpeted floor. When he commented that he did not think Tori's injuries were consistent with a fall from the couch, respondent suggested that "maybe some Mexicans came in" while he was upstairs.

In a taped statement made at the police station the next afternoon, respondent admitted that only he and Daisy had custody of the child on the day she died. He claimed Tori was sick, but denied that she had any trouble

breathing. Daisy left to make a telephone call about 9:00 p.m. McGuire put Tori on the couch and went upstairs. He heard the baby crying and found her lying on the floor. Respondent took Tori upstairs and put her in bed. When Daisy returned she noticed that Tori was pale and having trouble breathing. Respondent thought her stomach was hurting so they took Tori to the hospital. Respondent denied hitting the child.

Daisy McGuire was granted immunity from prosecution. She testified that she hit Tori during the day while respondent was out; she was mad because the baby had cried all day. In her statement to the police, however, Daisy denied striking the child and offered no such testimony at the preliminary examination. Her testimony about when she injured Tori was inconsistent with the medical evidence and the time of death.

Since his arrest Daisy had spoken with respondent a number of times about Tori's death. She had discussed her earlier statement with the public defender who represented her husband, but refused to meet with the district attorney unless her own lawyer was present.

Another resident of the McGuires' apartment complex once saw respondent holding Daisy against the wall with his knee in her stomach and choking her as she tried to escape. On another occasion Daisy told the woman that respondent had hit her across the face. The woman also saw respondent feeding Tori. He roughly pinched the baby's cheeks and forced food into her mouth; marks appeared on Tori's face. Daisy told the woman that she was afraid to leave Tori with respondent because he "pinched her cheeks and did bad things." That

same day the woman saw marks on Tori's thighs, buttocks, and face.

A few days before the killing, Daisy and Tori stayed with some friends on Treasure Island. She spoke about going to a battered women's shelter and expressed concern that respondent might obtain custody of their child in a divorce action. She complained about respondent's treatment of Tori.

In its instructions to the jury, the trial court limited consideration of the other assaultive behavior and of Tori's earlier injuries as follows:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so

> that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

B. Procedural History

Respondent's conviction for second degree murder was affirmed by the California Court of Appeal on January 15, 1985. A copy of the opinion is attached as Appendix E. The California Supreme Court denied hearing on March 21, 1985.

Respondent's second petition for writ of habeas corpus was filed in the United States District Court for the Northern District of California on August 30, 1985.[1/] The district court denied the petition in an unpublished, written opinion filed on July 15, 1987. It found that the evidence of Tori's prior injuries was properly admitted under state law, and that no federal constitutional rights were violated by the evidence or the instructions in respondent's trial. *See*, Appendix C, at A-31 to A-36. The district court granted a certificate of probable cause to appeal on August 10, 1987.

The Ninth Circuit's first opinion was filed on May 8, 1989. *McGuire v. Estelle*, 873 F.2d 1323 (9th Cir. 1989). The court found that admission of evidence about Tori's prior injuries and the diagnosis of battered child syndrome was improper because it was not relevant to any

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1. An earlier, otherwise identical petition, was denied without prejudice on April 24, 1985, for failure to allege that state remedies had been exhausted.

disputed issue in the case. The prejudice to respondent was, according to the Ninth Circuit, exacerbated by the limiting instruction on the jury's consideration of that evidence. The court also criticized the state's grant of immunity to Daisy McGuire and suggested that the local authorities consider whether she fraudulently negotiated the immunity and if so whether it should be withdrawn.

The Ninth Circuit vacated its first opinion on April 23, 1990, and filed a second opinion on May 4, 1990. *McGuire v. Estelle*, 902 F.2d 749 (9th Cir. 1990). The court again found that it was error to admit the prior injury evidence, relying in part on Federal Rules of Evidence 401 and 404. In its view, the evidence of Tori's injuries and the diagnosis of battered child syndrome were admitted in violation of state law and were irrelevant under the federal rules. The court also found that the limiting instruction allowed the jury to consider the other injuries as evidence of guilt, a use it found to be improper under the Federal Rules of Evidence. Although it no longer questioned the grant of immunity, the court concluded that "only the barest threads connect McGuire to the crime." 902 F.2d at 755. According to the Ninth Circuit, the evidence in the case established "mere shadows of guilt which leave ample room for reasonable doubt." *Id.*, at 756.

Rehearing and rehearing en banc were denied, but two circuit judges dissented from denial of en banc consideration. In their opinion, the panel improperly second-guessed the state courts' interpretation of state law and reversed without adequate demonstration of a federal constitutional violation. The judges also concluded that the panel's harmless error analysis was incomplete and

inadequate, and found the prosecution's case was "very strong indeed." Appendix D, at A-55. Finally, the dissent expressed concern that the decision could have a substantial, negative effect on the abililty of state officials to prosecute in cases of child abuse homicide. Appendix D (Kozinski, J. and Trott, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court has repeatedly reminded lower federal courts of the limited nature of review over state court judgments in habeas corpus actions. The Ninth Circuit's decision in this case reflects precisely the opposite view by ignoring the state's interpretation of its own law and relying upon the Federal Rules of Evidence as a basis for reversing a state murder conviction.

In its opinion affirming respondent's murder conviction, the California Court of Appeal noted that evidence of prior injuires has long been admissible under state law to support a diagnosis of battered child syndrome, which indicates simply that the child did not suffer her injuries by accidental means. *See* Appendix E, at A-64 to A-66. *People v. Jackson*, 18 Cal.App.3d 504, 507, 95 Cal.Rptr. 919, 921 (1971). Child abuse prosecutions "pose unique problems of proof" and are "commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse." *United States v. Leight*, 818 F.2d 1297, 1300-1301 (7th Cir. 1987). As a result, such cases demand "an even wider discretion than usual in admitting what is conceded to be extremely prejudicial evidence." *Id.*, at 1304. The Ninth Circuit itself recently acknowledged the importance of

battered child evidence in affirming a second degree murder conviction under federal law. *United States v. Boise*, 916 F.2d 497 (9th Cir. 1990).

Despite the admissibility of evidence about Tori's prior injuries under state law, and the acceptance of such evidence in federal prosecutions, the Ninth Circuit concluded that the evidence was improper in respondent's state court murder trial because respondent was not expressly connected to the infliction of those injuries. It thus concluded that the evidence was admitted "for no other purpose" than to demonstrate that respondent was a child abuser. The court also found that admission of the evidence was improper under state law because accidental death was not an issue in the case. 902 F.2d at 754. Having determined that the evidence was irrelevant, the Ninth Circuit then reviewed the instruction limiting its use by the jury. It held, apparently as a matter of constitutional law, that the instruction incorrectly informed the jury that it could "find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses." *Id.*, at 755. In doing so, the Ninth Circuit expanded the grounds for federal habeas corpus review by transforming a state's interpretation of its own rules of evidence into a means of federal review of a presumptively valid state judgment.

The Ninth Circuit's decision is at odds with the purpose of 28 U.S.C. § 2254. "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards." *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). "It is axiomatic that federal courts may intervene in the state judicial process only to

correct wrongs of a constitutional dimension." *Wainwright v. Goode*, 464 U.S. 78, 83 (1983). The Court has emphasized that the scope of habeas corpus is limited by "interests of comity and finality." *Teague v. Lane*, 489 U.S. 288, 308 (1989); *see also*, *Harris v. Reed*, 489 U.S. 255 (1989).

Last term the Court reaffirmed that "federal habeas corpus relief does not lie for errors of state law." The federal court must respect a state court's findings of fact and application of its own law, rather than engage in *de novo* review. *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3102 (1990). It may not "'peer majestically over the [state] court's shoulder'" in order to second-guess the state's interpretation of the facts. *Id.* "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990). Thus, a federal court has no basis for disputing the state's interpretation of its own law. *Clemons v. Mississippi*, ___ U.S. ___, 110 S.Ct. 1441, 1447 (1990). Unfortunately, in "its haste to create a novel" due process right, *Morris v. Slappy*, 461 U.S. 1, 16 (1983), the Ninth Circuit disregarded these limitations and once again improperly expanded the basis for habeas corpus relief by finding that admission of evidence about prior injuries suffered by the victim violated state law.[2/]

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2. Earlier this term the Court granted certiorari to consider whether the Ninth Circuit had unduly expanded its habeas corpus jurisdiction by finding a violation of state law which prejudiced the defendant. *Blair v. McCarthy*, 881 F.2d 602 (9th Cir. 1989), *cert. granted*, ___ U.S. ___, 111 S.Ct. 39 (1990), *vacated as moot and remanded*, ___ U.S. ___, 59 U.S.L.W. 3339 (November 5, 1990). The

The evidence of Tori's prior injuries was admitted under well-established state law permitting such evidence. *See, e.g., Landeros v. Flood*, 17 Cal.3d 399, 409, 131 Cal.Rptr. 69, 73 (1976); *People v. Steger*, 16 Cal.3d 539, 549, n. 4, 128 Cal.Rptr. 161, 164, n. 4 (1976); *People v. Jackson*, *supra*; *see also*, opinion of the California Court of Appeal, Appendix E, at A-64 to A-66. The Ninth Circuit, relying on the same cases cited by the state court, nevertheless found that the battered child evidence was only admissible in California to prove that the injuries did not occur by accident. Because, according to the court, respondent did not claim that Tori's death was accidental, the evidence of prior injuries was irrelevant and incorrectly admitted. 902 F.2d at 754. Apart from the inappropriateness of correcting state courts on questions of the admissibility of evidence under state law, the holding has serious implications for prosecutors throughout the Ninth Circuit.

If the Ninth Circuit's opinion is allowed to stand, whenever a defendant has not specifically contested an element of the offense, admitting evidence which is relevant only to that element could result in reversal on federal habeas corpus. On the other hand, failure to introduce the evidence could result in a directed verdict of acquittal. It is, as the dissent from denial of rehearing en banc notes, an insoluable "Catch-22" for the proseuctor. *See*, Appendix D, A-50 to A-52. The creation of this dilemma is particularly inappropriate since federal courts

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concerns about inappropriate reliance upon state law as a basis for granting federal habeas corpus relief which were at issue in *Blair* are just as clearly presented by this case.

have "no supervisory authority over state judicial proceedings." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). The Ninth Circuit has improperly expanded its federal habeas corpus jurisdiction through the expedient of reinterpreting state law. It has, in effect, reconstituted itself as a state appellate court. This, as the Court expressly held in *Lewis* and *Clemons*, it may not do.

The Ninth Circuit justifies its evaluation of state law by relying in part on the Federal Rules of Evidence. *See*, Appendix D, at A-49, n. 2. Those rules are not constitutionally based. *Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668, 674 (1990). As such, violation of the rules alone cannot constitute a federal constitutional violation, nor can the rules circumscribe a state's interpretation of its own rules of evidence. The Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling*, *supra*. "Rules of evidence are designed in the interest of fair trials. But unfairness in result is no sure measure of unconstitutionality." *United States v. Augenblick*, 393 U.S. 348, 352 (1969). Moreover, the rules generally do not prohibit the introduction of evidence, but rather limit the purpose for which it may be used. *Huddleston v. United States*, 485 U.S. 681, 687 (1988).[3/] When it enacted the rules, Congress was less concerned with the potential prejudicial effect of other crimes evidence "as it was with ensuring that restrictions would not be placed on the

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3. The Ninth Circuit has, in reviewing federal criminal prosecutions, recognized that Rule 404 is primarily inclusionary, as opposed to exclusionary. *See, United States v. Hadley*, ___ F.2d ___ (9th Cir. 1990), filed November 14, 1990 in No. 89-10428.

admission of such evidence." *Huddleston*, *supra*, at 688-689. The erroneous admission of evidence which results in a conviction is not sufficient to support a finding of federal constitutional error even on direct review of a federal conviction. *Dowling*, *supra*.

This case, however, does not involve a direct appeal from a federal conviction. It is a collateral attack on a state court judgment. The showing required to justify a reversal on habeas corpus from a state conviction is even greater than the plain error requirement on direct appeal. *Engle v. Isaac*, 456 U.S. 107, 134-135 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

In addition, the Ninth Circuit has specifically allowed federal prosecutors to use precisely the same evidence of prior injuries and battered child syndrome found to be constitutionally prohibited in respondent's state trial, to support a second degree murder conviction under federal law. *United States v. Boise*, *supra*, 916 F.2d 497. The Ninth Circuit lacks justification for authorizing such evidence in federal prosecutions, while excluding the same evidence from identical state court proceedings, particularly given the absence of any supervisory authority over the state proceedings. *Smith v. Phillips*, *supra*.

The Ninth Circuit's holding that a limiting instruction on the use of other crimes evidence was prejudicial is equally erroneous. A jury instruction must itself infect the entire trial in order to establish a violation of due process. *Henderson v. Kibbe*, *supra*, 431 U.S. at 154. It is not enough to show that the instruction was undesirable, erroneous, or condemned; it must violate some due process right protected by the Fourteenth

Amendment. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The state trial record does not support such a showing.

The instruction allowed the jury to consider evidence of prior similar acts to impeach the testimony of respondent's wife, to establish the battered child syndrome, and to find that respondent committed the present offense if it could logically be concluded that he committed the other offenses. The Ninth Circuit concluded, again in reliance on the Federal Rules of Evidence, that the evidence of prior injury to the victim was not explicitly connected to respondent and therefore could not be used to permit an inference of guilt in this case. This precise objection was rejected by the state trial court, which noted that if the jury found from the evidence of prior injuries that the victim was a battered child, it could then conclude that her death was not accidental. Once it made that finding, the jury could consider respondent's contrary assertions to his wife and to the police that the death was accidental to be lies indicating a consciousness of guilt, and further infer that respondent murdered his baby. Similarly, a finding by the jury that respondent hit his wife and baby as described in the testimony, coupled with his lies about the cause of Tori's fatal injuries, would properly support a finding of guilt.

This use of the evidence was proper under state law and nothing in the Ninth Circuit's opinion suggests a constitutional basis for challenging the instruction. Indeed, the federal courts have recognized, in prosecutions for child abuse homicides under federal law, that proof of prior injuries demonstrating the death was not accidental, coupled with the defendant's custody of the child when

the fatal blows were inflicted, will support a conviction for murder. *See, e.g., United States v. Boise, supra*, 916 F.2d at 500; *United States v. Harris*, 661 F.2d 138, 141 (10th Cir. 1981); *United States v. Bowers*, 660 F.2d 527, 529 (5th Cir. Unit B 1981); *United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973).[4]

"Tori McGuire's short life was the type of horror no sentient being should have to endure." Appendix D, at A-46. Unfortunately, cases like this and deaths such as Tori suffered are much too common. A recent survey shows that 1,237 child abuse fatalities were reported nationwide in 1989. The National Center on Child Abuse Prevention Research, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual Fifty State Survey*, p. 14 (March 1990). The number of reported child abuse homicides has increased by 38% since 1985. *Id.*, at 15. Children died at the rate of one murder by a parent or guardian per week in Los Angles County in 1989. Los Angeles Times (November 14, 1990) at page 1A, column 2. In Chicago, 41 children under the age of 10 died in reported homicides last year. Of those victims, 32 were, like Tori McGuire, one year old or younger. Chicago Tribune (May 20, 1990) at page 1.

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4. As noted, the evidence of prior injuries was admitted on three grounds. Although the Ninth Circuit, albeit incorrectly, found one basis to be improper, it completely ignored the other two. If the evidence would have been admitted anyway, a showing of constitutional error, much less prejudice, becomes substantially more difficult. The state court found that the evidence was proper to prove the battered child syndrome and to rebut a claim of accident. As a result, the state court did not have to consider the other grounds of admission. The federal court's refusal to do so, however, is unexcused and unexplained. *See*, Appendix D, at A-54 to A-55.

Child abuse cases "present many unusual problems of proof." *United States v. Leight, supra*, 818 F.2d at 1304. There are usually no witnesses, often the victim is dead, and even if the victim survives she may be too young to describe what happened. As a result, the cases are "commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse." *Id.*, at 1301. Absent a clear violation of a federal constitutional right, no justification exists for removing from state prosecutors their most effective, and sometimes only, weapon for convicting the abusers. The Ninth Circuit, however, has done precisely that. As persuasively argued in the dissent from denial of rehearing en banc, the decision places in jeopardy any Ninth Circuit *state* court prosecution for a child abuse homicide in which evidence of prior injuries is admitted. Appendix D.

In *Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157 (1990), the Court recognized the states' "interest in the physical and psychological well-being of child abuse victims." 110 S.Ct. at 3167; *see also New York v. Ferber*, 458 U.S. 747, 757 (1982) [the courts will attempt to protect the physical and emotional well-being of children]. The Ninth Circuit's improper, expansive view of its habeas corpus jurisdiction ignored that interest. Certiorari should be granted to restore to the states their ability to effectively prosecute and punish those who prey upon the most defenseless members of our society.

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CONCLUSION

For the reasons stated above, we respectfully request that the Petition for Writ of Certiorari to the Ninth Circuit be granted.

Dated: December 13, 1990.

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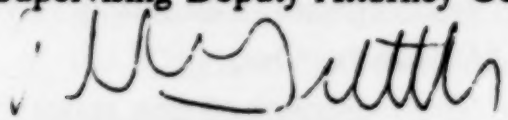

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APPENDICES

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant,	)	No. 87-2522
v.	)	D.C. No. CV-85-6521-TEH
WAYNE ESTELLE, Warden, Defendant-Appellee.	)	OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted June 14, 1988
San Francisco, California
Opinion filed May 8, 1989 and withdrawn April 23, 1990

Filed May 4, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*****/, District Judge.

Opinion by Judge Wiggins

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial, coupled with an instruction that permitted the jury to consider those prior acts as evidence of his guilt of the crime charged, were errors that denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

Because a proper consideration of McGuire's due process claim requires weighing the prejudice to him of the error he alleges, we examine the trial testimony in some detail.

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six month old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

The father, McGuire, was charged with second degree murder of his child.

At trial, the prosecution called Dr. Levine, the doctor who examined the baby at the hospital. She testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating a healed tearing around the anus. Doctor Levine opined that the rectal tear was not caused by constipation or fecal impactment. She testified that such scarring probably resulted from the forceful insertion of a finger or some other foreign object. The doctor also testified that the baby had suffered from seven earlier rib fractures.

A different doctor performed an autopsy on the baby and testified that there were at least 17 contusions on the baby's chest and 29 more on her abdomen. He testified that his examination of the internal organs

revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her intestine was lacerated. The doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire made timely objection to all evidence of prior injuries as not being connected to him. The objections were overruled.

None of the foregoing evidence of injury to the child included evidence of who caused the injuries to her.

The prosecution also called a witness who had overheard McGuire talking to his wife in the emergency room of the hospital. The witness stated that McGuire's wife asked him "what really had happened?" and McGuire is reported to have responded that the baby had fallen from the couch.

A police officer was called by the prosecution. He testified that McGuire had told him that the child had fallen from the couch. The officer than told McGuire that the baby's injuries were inconsistent with a fall from the couch. McGuire thereupon responded that "maybe some Mexicans came in while I was upstairs."

McGuire's wife was next called as a witness by the prosecution. She was granted transactional immunity for her testimony although she had made no statement to the prosecutor prior to the trial. When asked about the circumstances of the baby's death, she testified that she, and not her husband, had beaten the baby. She gave a confused account of having struck the baby in the

afternoon of July 7, 1981 and that the child did not move, cry, or cough thereafter.

McGuire's wife testified that on the afternoon of the 7th, after she struck the child, she left the house for about ten minutes and when she returned, the child was not breathing. She stated that she asked her husband what had happened and he said the child had fallen from the couch and struck the walker. She also testified that several weeks prior to the baby's death, she inserted her finger into the baby's rectum in an attempt to relieve her of constipation. She also testified to staying at a neighbor's house for four days prior to the 7th and had made inquiries about a battered woman's shelter.

The prosecution introduced evidence that a fall from a couch could not have produced the injuries causing the baby's death. The prosecution also introduced evidence that McGuire had treated the baby roughly in the past.

The defense countered with witnesses who testified they had never seen McGuire abuse the child. McGuire did not testify in his own defense.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254(a). Order to show cause issued on February 26, 1986. In its original response, the state of

California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. EXHAUSTION

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a

second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1] Thus we may reach the merits of McGuire's claims.

II. THE CONSTITUTIONALITY OF APPELLANT'S CONVICTION

We review the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to habeas relief only if he is held in violation of the constitution, laws, or treaties of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire contends that the procedures used to convict him in state court violated his fourteenth amendment right to due process. U.S. Const. Amend. XIV. We agree.

A claim for deprivation of due process will succeed only if the trial court's errors rendered the trial arbitrary or fundamentally unfair. *Pennywell v. Rushen*, 705 F.2d 355, 357 (9th Cir. 1983). In the instant case we find that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most

1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

prejudicial manner possible, rendered appellant's trial arbitrary and fundamentally unfair.

A. THE ADMITTANCE OF IRRELEVANT, PREJUDICIAL EVIDENCE

The trial court admitted extensive evidence of prior physical abuse the baby had suffered, including evidence of possible sexual abuse. However, that evidence has no relevance to appellant because the prosecution did not establish that appellant inflicted those injuries.

In order for evidence to be relevant, it must have some probative value. *See, e.g.*, Fed.R.Evid. 401 (evidence to be relevant must make the determination of the action more probable or less probable than it would be without the evidence). Evidence cannot have probative value unless a party connects it to the defendant in some meaningful way. *See, e.g., United States v. Hooten*, 662 F.2d 628, 635 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982) (in order for prior act evidence to be admissible under the Fed.R.Evid. it must be "similar and close enough in time to be relevant"); *People v. Rivera*, 41 Cal.3d 388, 392, 710 P.2d 362, 364, 221 Cal.Rptr. 562, 564 (1985) (in bank) ("In order for evidence of a prior [act] to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the [prior act and the charged offense] must have enough shared characteristics to raise a strong inference that they were committed by the same person. . . . It is not enough that the two acts contain common marks.").

In the instant case, the prosecution made no such connection. The prosecution elicited evidence that McGuire was rough with the baby, and that on one occasion McGuire had squeezed the baby's cheeks. Daisy McGuire also stated that she feared leaving the baby alone with McGuire. We recognize the temptation to find that such evidence is enough to infer that McGuire caused the prior rectal tearing and the broken ribs. However, we cannot permit a jury that temptation. Evidence of McGuire's petty meanness does not establish that he committed, or is even capable of, the extensive physical abuse inflicted on the child. It is precisely because anyone, including Daisy McGuire, could have inflicted those injuries that makes the prior injury evidence irrelevant.

We emphasize that the trial court's error was not simply that it admitted the prior evidence under the wrong evidentiary theory. Nor do we dispute that there are constitutionally permissible uses for admitting evidence of prior bad acts. *See* Fed.R.Evid 404(b) (evidence of other crimes, wrongs or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge identity, or absence of mistake or accident); *United States v. Lewis*, 837 F.2d 415, 418-419 (9th Cir.), *cert. denied*, 109 S.Ct. 304 (1988) (evidence of prior child abuse properly admitted to show intent). However, acts which the prosecution did not connect to appellant cannot be characterized as *his* prior acts.

Furthermore, we find the introduction of such prior injury evidence highly prejudicial. The prosecution introduced evidence of prior injuries to the baby to establish that appellant was a child abuser, and for no

other purpose, in a murder trial for the death of his child. The trial court incorrectly admitted the evidence pursuant to California law allowing past injury evidence to establish the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

However, in the instant case, no claim was made that the child died accidentally. The prosecution attempted to prove Mark McGuire deliberately did it. The defense attempted to prove Daisy McGuire deliberately did it. Although the prosecution did not succeed in proving that the appellant caused the prior injuries, we cannot ignore that a trial of the grisly murder of an innocent baby implicates highly charged emotions. The unproven characterization of appellant as a child abuser maximized the prejudice flowing from the irrelevant evidence. *See Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988) (granting habeas relief where prejudicial effect of evidence so outweighed probative value that result was a denial of fundamental fairness); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing and remanding a denial of habeas corpus petition on basis that prejudicial effect of evidence might have risen to such magnitude as to deny fundamental fairness); *Bisaccia v. Attorney General of State of New Jersey*, 623 F.2d 307 (3d Cir. 1980) (same).

B. IMPROPER JURY INSTRUCTIONS

The trial court did not merely admit irrelevant, highly prejudicial evidence without comment. The trial court *instructed* the jury to use that evidence in the most improper way possible. We assume that the jury followed its instructions. *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 604 (1985). The trial court's jury instructions stated:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a connection between the other two offense (sic) and the one of which the defendant is accused *so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case.*
>
> You are not permitted to consider evidence for any other purpose.

(emphasis added).

Subsection 3 of the instruction is erroneous.[2/] It permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts. The rejection of such use of circumstantial character evidence in criminal cases has become "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions. . . ." Fed.R.Evid. 404(a) advisory committee's note.

Not only have we never condoned an instruction which permits a finding of guilt based on a conclusion that the appellant committed prior bad acts, we have consistently stressed the importance of a *limiting* instruction to confine the use of prior bad act evidence to the proper purpose for which the court admitted it. *See United States v. Green*, 648 F.2d 587, 593 (9th Cir. 1981) (admission of bad act evidence in conjunction with failure of trial judge to provide limiting instruction following admission of bad act evidence required reversal); *cf. Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) (no due process violation resulted from wrongful admission of prejudicial evidence where instructions limited use of that evidence to find intent); *United States v. McCown*, 711 F.2d 1441, 1454 (9th Cir. 1983) (no due process

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2. It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

violation resulted from admission of prior bad acts evidence where prejudice was minimal and trial judge offered to give a limiting instruction).

The damage done by subsection 3 is not limited by a qualifying instruction by the court. Nor is subsection 3 limited by the preceding subsections of the instruction. The first subsection simply warned the jury not to use the evidence of prior bad acts to find that McGuire was a bad person and therefore infer that McGuire was likely to have committed this crime. Subsection 3, however, informed the jury that it may find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses. For these reasons, the faulty instruction considered along with the admittance of the prejudicial evidence "so infected the entire trial that the resulting conviction violate[d] due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Nor do we believe that this error can be considered harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming. *See Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988) (error not harmless even when evidence of petitioner's guilt was "impressive but not overwhelming.").

III. CONCLUSION

We find that the jury instruction which permitted the direct determination of guilt from evidence of prior injuries not connected to McGuire denied him due process. The severity of these errors sets this case apart

from arguably similar cases in which we rejected claims that evidentiary error rendered a trial fundamentally unfair. For example, in *Lewis*, we found no due process error where the trial court admitted evidence of prior child abuse in a defendant's trial for the murder of his son. 837 F.2d at 418-19. However, *Lewis* suffered from neither of the errors we find determinative in the instant case. In *Lewis*, the testimony of two witnesses connected the defendant to the infliction of the prior injuries, and the trial court provided a limiting instruction. *Id.*, at 419.

Because the prejudicial effect of the errors discussed above amount to a denial of due process, we grant McGuire's habeas petition. However, we are also not blind to the fact that apart from those errors, only the barest threads connect McGuire to the crime. True, given the pattern of most child abuse cases, it is not unreasonable to assume that one or both of the baby's primary care givers were responsible for the baby's injuries and death. We are also mindful that in the emergency room, McGuire answered unconvincingly in response to Daisy McGuire's accusation that McGuire bore responsibility for the baby's injuries leading to death. And evidence existed that McGuire had treated his wife and the baby roughly in the past. But these are mere shadows of guilt which leave ample room for reasonable doubt. Due process requires more than a simple intuitive feeling that the father may be guilty. It requires convincing proof.

We REVERSE and REMAND for a new trial.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant,	)	No. 87-2522
v.	)	D.C. No. CV-85-6521-TEH
WAYNE ESTELLE, Warden, Defendant-Appellee.	)	OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
June 14, 1988 -- San Francisco, California

Filed May 8, 1989

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

Opinion by Judge Wiggins

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Reversing the district court's denial of a petition for a writ of habeas corpus and remanding for a grant of a conditional writ, the court held that the admission of evidence of prior acts violated due process.

Appellant Mark McGuire was convicted of second degree murder in the death of his infant daughter. At the trial, McGuire's wife was granted transactional immunity by the prosecution. The trial judge admitted evidence of prior injury to the child, which also indicated possible sexual abuse. The jury was instructed on the prior injury evidence in such manner that if they found that McGuire had committed any previous offenses against the child, they could find him guilty of the charged offense.

[1] An erroneous evidentiary ruling will not cause a writ to issue unless a specific constitutional guarantee has been violated or the error results in the denial of fundamental fairness. **[2]** The probative value of evidence of prior injuries was negligible since the only permissible proposition the evidence could prove was whether the injuries were accidental or intentional and the defense was not predicated on proof of accident. **[3]** The prejudicial quality of the evidence was exacerbated by the instruction and the instruction alone probably constituted error of constitutional dimension.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial was error and denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six-month-old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

At trial, one of the baby's treating physicians testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating tearing around the anus. A doctor who performed an autopsy on the body testified that there were at least seventeen contusions on the baby's chest and twenty-nine more on her abdomen. Examination of the internal organs revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her large intestine was lacerated. Over McGuire's objection, the doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire's wife was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she, and not her husband, had beaten the baby.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.D. § 2254(a). Order to show cause issued on

February 26, 1986. In its original response, the state of California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. *Exhaustion*

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement

made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1] Thus we may reach the merits of McGuire's claims.

II. *Past Injuries.*

This court reviews the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held in violation of the Constitution or laws of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire contends that admission of evidence of the baby's prior injuries, coupled with a jury instruction that allowed the jury to infer that if he committed the prior offenses he committed the charged crime, deprived him of due process. An erroneous evidentiary ruling will not cause a writ to issue unless a specific constitutional guarantee has been violated or the error is of such magnitude that the result is a denial of fundamental fairness. *United States v. DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). Before a federal court may overturn a state court conviction based on an incorrect or

1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

erroneous jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The erroneous jury instruction must have rendered the trial so fundamentally unfair as to have denied McGuire due process. *Ahlswede v. Wolff*, 720 F.2d 1108, 1111 (9th Cir. 1983) (per curiam), *cert. denied*, 469 U.S. 873 (1984).

At trial, the prosecution introduced evidence that the baby had been physically abused in the past. Some of this evidence also indicated possible sexual abuse. The evidence was admitted pursuant to California law allowing such evidence to show that a child was a victim of the "Battered Child Syndrome." "The syndrome means that a child has received repeated and/or serious injuries by non-accidental means. . . ." *People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *see also People v. Steger*, 16 Cal.3d 539 549 n.4, 546 P.2d 665, 671 n.4, 128 Cal.Rptr. 161, 167 n.4 (1976). Proof of the syndrome "essentially means that the victim's injuries were not inflicted by accidental means. . . ." *Landeros v. Flood*, 17 Cal.3d 339, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976). In other words, proof of the syndrome demonstrates that a child has suffered repeated injuries over a period of time. These cases demonstrate that the California courts have been careful to limit proof of the syndrome to show that the child had not accidentally suffered the injuries. The additional finding that the injuries were probably caused by a particular person may not be made simply on the basis of proof of the syndrome

itself. *See Jackson*, 18 Cal.App.3d at 507, 95 Cal.Rptr. at 921.

Jackson and *Landeros* make clear that proof of the syndrome does not prove who caused the injuries. That fact, though it may be inferred from proof of who was in contact with or cared for the child, is separate and distinct from proof of the syndrome itself. *Id.* In the case at bar, no one claimed that the child died accidentally. The *prosecution* introduced McGuire's pretrial statement that the injuries that killed the baby might have been caused by her falling off the couch. McGuire's defense at trial was not predicated on this or any other proof of accident. Rather, he attempted to prove that his wife had killed the baby. The undisputed evidence of the massive injuries to the baby overwhelmingly refuted any inference of accidental death. The only permissible proposition this evidence could prove was whether the baby had suffered accidental or intentional injuries. This proposition was not at issue in this case. Thus, the probative value of the evidence of these prior injuries was negligible.

In addition, the prejudicial nature of this evidence was inherently great. *Cf. DeRobertis*, 738 F.2d at 171 (in a due process analysis of questioned evidence, the issue is whether the probative value of the evidence outweighs the prejudice to the accused). Proof of prior injuries to a small baby, coupled with the sexual nature of some of the injuries, inevitably prejudices McGuire. More significantly, there was little proof that McGuire was responsible for these injuries. It is certainly logical to infer that the primary care givers of the baby hurt and sexually molested the child on some prior date. The jury, however, was

presented with no direct proof of whether McGuire or his wife caused these prior injuries. Either could have been responsible. One possibility, however, had been foreclosed by the prosecution. By offering the wife immunity, the jury was left with only one option -- to find McGuire guilty of the murder. Proof of the prior injuries, not necessary to prove that the baby's death was purposeful, could only have further prejudiced McGuire in front of the jury.

The prejudicial quality of the evidence was exacerbated by an instruction given to the jury. The trial court instructed the jury on the prior injury evidence as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. . . . Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show
>
> . . .
>
> a connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed the other offenses, he also committed the crime charged in the case.

This instruction specifically told the jury that if it thought McGuire committed the other two "offenses" they could find him guilty of the charged offense. The instruction alone would probably constitute error of constitutional

dimension. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985); *United States v. Winters*, 729 F.2d 602, 604 (9th Cir. 1984). Certainly, coupled with the inherent prejudicial quality of the evidence itself, the error was of such magnitude to deny McGuire a fundamentally fair trial. We hold that McGuire was denied due process by admission of this evidence and its associated jury instruction.[2]

CONCLUSION

We are troubled that our disposition does not do justice in this case. A baby has been killed. Only the father and mother had access to the baby. One or the other, or perhaps both, are responsible for the death. This appeal, however, only concerns McGuire. Perhaps the state authorities should examine whether the mother fraudulently negotiated her grant of immunity, and if so, whether the immunity can be withdrawn. We express no opinion as to whether the evidence justifies a retrial of McGuire, his wife, or both, for murder.

We REVERSE the district court's denial of McGuire's petition for a writ of habeas corpus. We REMAND to the district court for the grant of a conditional writ. The state is permitted 90 days from this remand to refile.

REVERSED AND REMANDED.

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2. Given our disposition of this case, we do not reach or decide the appellant's *Miranda* claim.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK OWEN McGUIRE,	)	
	)	
Petitioner,	)	No. C 85-6521 TEH
	)	
v.	)	ORDER
	)	
WAYNE ESTELLE,	)	
	)	
Respondent.	)	

Petitioner Mark McGuire was convicted of second degree murder in Alameda County Superior Court for the killing of his infant daughter. On May 12, 1982, petitioner was sentenced to a term of 15 years to life for the murder, and is currently serving this sentence at the California Men's Colony in San Luis Obispo. The California Court of Appeal affirmed his conviction, and the California Supreme Court denied his petition for a hearing. Petitioner applied to this Court for a writ of habeas corpus, alleging violations of his federal constitutional rights by the state trial court that convicted him, and this Court issued an Order to Show Cause. There are presently five claims before this Court: 1) denial of due process based on the improper admission of prior act evidence; 2) denial of due process based on erroneous jury instructions with respect to the admission

of prior act evidence; 3) violation of the procedural protections afforded by *Miranda v. Arizona*, 384 U.S. 430 (1966), based on the improper admission of a statement at trial; 4) denial of due process based on prosecutorial misconduct during the prosecutor's closing argument; 5) denial of due process based on denial of discovery. Having considered the papers of both parties and the entire record presented, this Court hereby denies petitioner's application for a writ of habeas corpus.

FACTS

About 9:00 p.m. on July 7, 1981, petitioner and his wife brought their six month old baby daughter to the Emergency Room of Kaiser Hospital in Hayward. The screening nurse noticed that the baby was bluish in color and not breathing. She immediately took the baby to an emergency treatment room, and then returned to the screening area to obtain a medical history. Petitioner told the nurse that the baby had a cold recently and had hit her head that morning when she fell off of the couch. The efforts of doctors to save the baby were unavailing, and she was pronounced dead at 9:45 p.m.

Sharon Levine, M.D., assisted in treating the baby and testified at trial that the child was essentially lifeless with no vital signs when brought to the hospital. Dr. Levine also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruises around it, black and blue marks on her ears, and scar tissue indicating tearing around the rectum. An autopsy performed by Paul Herman, M.D., on July 8 revealed at least 17 contusions on the baby's chest, and

29 more on her abdominal area. When he examined her internal organs, Dr. Herman found that the baby's liver was split apart, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of the large intestine was lacerated. Dr. Herman also discovered evidence of rectal tearing, which was a least six weeks old, and evidence of several partially healed rib fractures which were approximately seven weeks old.

The police arrived at Kaiser Hospital at 9:45 p.m., about the same time the baby was pronounced dead. The police separated the McGuires and briefly questioned them at the hospital about the baby's injuries. Petitioner indicated to Officer Lapic that the baby might have fallen off the couch and struck the walker which was next to it, although he was not sure. Petitioner was not given *Miranda* warnings before or during the questioning at the hospital, and he was not informed by police or by hospital personnel that the baby had died.

Petitioner and his wife were then taken to the Hayward Police Department in separate cars, and separately questioned there without *Miranda* warnings. Petitioner's wife told police that she had not hit the baby and that she did not know whether her husband had. At the end of the interview, the police told her that the baby was dead. Petitioner told police that his wife had gone outside to make a telephone call, leaving the baby on the couch, and that he heard the baby cry while upstairs using the bathroom. When he came downstairs, he said, he found the baby lying on the floor. At the end of the interview, the police told him the baby had died but that

they would not know the cause of death until the coroner completed an autopsy.

The police then drove petitioner and his wife to their apartment, had them sign a "Consent to Search" form, and then proceeded to take pictures and measurements of the home. Following the search of the apartment, petitioner was interviewed briefly in the parking lot to determine whether inordinate pressure had been applied to the baby's chest in an effort to revive her. In addition, Officer Lapic questioned petitioner outside the presence of other officers about the origin of the baby's bruises and was told that "Maybe some Mexicans came through the door" while he was upstairs, a statement that was not revealed until Officer Lapic's testimony at trial. No *Miranda* warnings were given up to this point.

The police called the McGuires the next day, July 8, and asked them to come to the station to discuss the coroner's report. Petitioner arrived at the station for questioning and there was advised for the first time of his rights under *Miranda*. He waived his rights and proceeded with the interview. About halfway through the interview, he was told that the coroner's report indicated the baby had been beaten to death. Petitioner was arrested at the termination of the interview. His wife was not arrested and was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she had beaten the baby just prior to her husband's arrival at the house on July 7.

DISCUSSION

1. Admission Of Prior Act Evidence

In addition to Dr. Levine's testimony that the baby had sustained at least 46 contusions on her chest and abdomen, evidence was introduced of several partially healed rib fractures which were about seven weeks old and of a tearing wound of the rectum which was about six weeks old. Based on this evidence of past injuries, in addition to the more recent injuries causing death, both Dr. Levine and Dr. Herman concluded at trial that the baby was a battered child. Petitioner now argues that this evidence of prior injuries to the baby, for which he was not on trial and to which he was not tied, was prejudicial and denied him due process of law.

For the limited purpose of showing that injury or death resulted from nonaccidental means, California courts have allowed admission of evidence of prior acts under California Evidence Code Section 1101(a). *See People v. Bledsoe*, 36 Cal.3d 236, 249 (1984). A diagnosis of battered child syndrome, based on evidence of past injuries, is not an opinion that any particular person caused the injuries, but relates solely to the likelihood that the injuries were accidentally inflicted. *People v. Jackson*, 18 Cal.App.3d 504, 506-507 (1971). In this case, evidence of the two types of prior injuries was admitted by the trial court to support a diagnosis of battered child syndrome and prove that the baby's death was not accidental. This was a proper use of evidence under California evidence rules.

Since the evidence was admissible under state evidentiary rules, petitioner must demonstrate that a constitutional right was implicated by its use in order to merit habeas corpus relief. *Engle v. Isaac*, 445 U.S. 107, 119 (1982). Introduction of evidence must be so prejudicial as to result in a denial of fundamental fairness. *Palmer v. DeRobertis*, 738 F.2d 168, 170 (7th Cir. 1984). No showing of prejudice has been made by petitioner with respect to admission of prior act evidence. Petitioner argues that the prior act evidence was irrelevant, because no defense of accident was ever presented, and cumulative, because testimony of doctors at trial already established that death was not the result of accident without resort to prior act evidence.

The evidence, however, was relevant to the prosecutor's case-in-chief, despite the lack of an accident defense, in order to show that death was the result of criminal agency and to rebut the statement introduced at trial that the baby may have died from falling off of a couch. In addition, the contention that the evidence was cumulative is speculative on petitioner's part. Even though the testimony of Dr. Levine supported the view that death was not the result of accident, without resort to prior act evidence, it cannot be said that this testimony alone conclusively established that position. Thus, the prosecution was allowed to introduce additional evidence, including evidence of prior injuries, to show the battered child syndrome and prove that death was not the result of accident. Moreover, even if admission of prior act evidence was irrelevant and/or cumulative, petitioner has not shown that it was so prejudicial as to amount to a denial of fundamental fairness. *See DeRobertis*, 738 F.2d

at 170; *Cronnon v. State of Alabama*, 587 F.2d 246, 250 (5th Cir. 1979), *cert. denied*, 440 U.S. 974 (1979); *Thomas v. Cardwell*, 626 F.2d 1375, 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 889 (1981).

2. Jury Instructions Concerning Evidence Of Prior Acts

The state trial court instructed the jury on the use of prior acts evidence, including evidence of the two prior injuries to the baby, as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
> 2. To establish the battered child syndrome, and
> 3. Also a connection between the other two offenses and the one of which the defendant is accused, so that it may be

> logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case. You are not permitted to consider evidence for any other purpose.

Petitioner argues that Part 3 of this instruction improperly allowed the jury to base its verdict on acts for which he was not on trial and to which he was not connected, instead of limiting the use of the prior act evidence to show absence of accident.[1/]

Federal habeas corpus relief is not available to set aside a conviction because of an erroneous jury instruction unless the error rendered the trial so fundamentally unfair as to deny due process. *Ahlswede v. Wolff*, 729 F.2d 1108, 1111 (9th Cir. 1983); *Quig v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980); *Shepard v. Nelson*, 432 F.2d 1045, 1046 (9th Cir. 1970);

1. Petitioner also argues that Part 3 of this instruction allowed the jury to connect testimony that he treated the baby roughly on one occasion and that he slapped his wife on another occasion to the offense charged, because the jury might have believed those to be the "other two offenses" referred to. In reviewing the instruction, we find no merit to this contention. Part 1 and 2 of the jury instructions sufficiently indicate the use to which evidence of those two prior acts was to be put -- the slapping incident to rebut Daisy McGuire's testimony that she had no cause to be afraid of her husband, and the rough handling incident to rebut Daisy's testimony and help establish the battered child syndrome. Moreover, the reference in Part 3 of the instruction to "the other two offenses," when read in the context of the entire instruction and the trial, can only mean to refer the jury to the two prior injuries to the baby, not the slapping and rough handling incidents. Although the "two offenses" should have been specifically named in the instruction, this lack of clarity did not significantly prejudice petitioner's case at trial. *See United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985).

Trujillo v. Stone, 384 F.Supp. 633, 635 (N.D. Cal. 1974). The erroneous instruction must be so prejudicial as to affect the entire trial not merely an instruction which is "undersirable [sic], erroneous or even 'universally condemned'". *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). The appraisal of the significance of error requires a comparison of the instructions actually given with those that should have been given. *Henderson*, 431 U.S. at 154; *Cupp*, 414 U.S. at 146-147.

It is a close question whether Part 3 of the jury instruction, allowing the jury to connect evidence of the baby's prior injuries to petitioner and then to the offense charged, was in violation of the California Evidence Code.[2/] However, we need not reach this issue because petitioner has not demonstrated that any possible error rendered his trial so fundamentally unfair that he was denied due process. *Ahlswede*, 720 F.2d at 1111. Admission of evidence of past acts, for the possibly improper purpose of connecting petitioner to those past acts and then to the offense charged, did not "infect the entire trial". *See Henderson*, 431 U.S. at 154.

2. California Evidence Code Section 1101(c) makes evidence of other crimes inadmissible when offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged. *People v. Nottingham*, 172 Cal.App.3d 484, 495 (1985). On the other hand, Evidence Code Section 1101(b) makes admissible evidence of prior acts relevant to prove some fact expressly in issue, such as the motive, intent, knowledge or identity of the perpetrator of the crime charged. Whether evidence is relevant under Section 1101(b) depends additionally on whether its probative value outweighs any undue prejudice. *People v. Tassell*, 36 Cal.3d 77, 88 (1984).

Examination of the trial record reveals that there was substantial evidence, however circumstantial, to support the jury's finding that the baby's death was the result of a murder and that petitioner was responsible. Admission of prior act evidence did not amount to a "crucial, critical, highly significant factor" in the jury's finding of second degree murder. *See Love v. Young*, 781 F.2d 1307, 1312-1313 (7th Cir. 1986). The jury heard evidence that petitioner was in the house at the time of the baby's death and that his wife, the only other person in the house that day, stepped outside before the baby had been fatally injured. The jury heard petitioner's wife testify. This and other evidence allowed the jury to decide petitioner was behind the baby's death notwithstanding any prior act evidence.

3. *Miranda* Violation

Petitioner spoke with police and investigators several times on July 7, the day that he and his wife brought their injured baby to the hospital. No *Miranda* warnings were given to petitioner before or during any of these July 7 discussions. On July 8, petitioner was asked to come to the police station and when he arrived was given *Miranda* warnings before questioning took place. At trial, the prosecution introduced one of petitioner's statements, made on July 8, after *Miranda* warnings. Petitioner now urges that this statement was involuntary and in violation of his Fifth Amendment rights, because even though it was made after proper administering of *Miranda* warnings, it was the fruit of prior illegal interrogations by investigators.

Miranda warnings are required whenever a person questioned is in custody or the restraint on his freedom of movement is of a degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1123 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977). Mere presence at the police station cannot be necessarily equated with custody. *See Beheler*, 463 U.S. at 1123. Although this Court must independently make the legal conclusions as to whether a petitioner was in custody at the time of a statement, and as to whether statements were voluntary, this Court must presume the correctness of all state court factual findings, unless there is no factual support for them in the record. *Summer v. Mata*, 449 U.S. 539, 545 (1981).

The state court examined the discussions between petitioner and investigators voluntarily and while petitioner was not in custody.[3] We find ample support in the record for this position. No restrictions were placed on petitioner's freedom of movement during any of the July 7 discussions, including those taking place at the police station. Upon accompanying the police officers to the station on July 7, petitioner was specifically told that he was not under arrest and was under no obligation to go there. Because all of the July 7 questioning took place while pettioner [sic] was not in custody, no *Miranda* warnings were required and the July 8 statement used at trial was not the fruit of prior illegal interrogation.

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3. The trial court did not consider the statement made at the apartment complex to one of the officers that "Maybe some Mexicans came through the door." However, this statement was also made voluntarily and while petitioner was not in custody, and does not alter our conclusion that all July 7 questioning was noncustodial.

Petitioner further argues that police used trickery and deception during the July 7 discussions by withholding from him information that his baby had died and that he was a suspect in the death. Petitioner contends that this deception rendered the July 7 questioning coercive and tainted the subsequent statement given after *Miranda* warnings. This Court finds no support in case law for the view that trickery or deception render questioning coercive. Petitioner was told he could refuse to speak and could request a lawyer and was aware that any statement he made could be used against him. Waiver of his rights on July 8 was thus free and voluntary and the statement coming out of the July 8 questioning was properly introduced against him. *See Moran v. Burbine*, 106 S.Ct. 1135, 1142 (1986).

4. Prosecutorial Misconduct

Petitioner argues that the prosecutor made several prejudicial remarks during closing argument which constituted misconduct and denied him due process of law. Only one of the allegedly prejudicial statements was objected to at trial by petitioner's counsel. That objection came at the beginning of the prosecutor's argument, during which the prosecutor discussed first degree murder in this second degree murder case. Petitioner's counsel, in his state appellate court brief submitted to this Court, claims that because this objection was overruled, he did not want to continue to make objections during the closing argument which would almost certainly be overruled. The remarks complained of which were not objected to include: 1) statements implying that

petitioner's wife offered testimony which was part of a defense plot to suborn perjury; 2) statements made that the crime would go unpunished if the jury believed petitioner had not commited [sic] the crime because his wife had been granted immunity; 3) an inflammatory statement that if the jury believed petitioner, it should send him home to pick up his other recently born baby; 4) references made to inflammatory and controversial cases in an attempt to link the apparent miscarriage of justice found in those cases to a not guilty verdict for petitioner.

Under California law, claims of misconduct can only be reversed on appeal if objected to at trial. *People v. Fosselman*, 33 Cal.3d 572, 580-581 (1983). Under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the failure to observe a state's "contemporaneous objection" rules results in a procedural default which precludes habeas corpus relief. The only exception to this default rule occurs when a petitioner can demonstrate that there was "cause" for his failure to raise the objection at trial, and "prejudice" accruing from the failure to object. *Engel v. Isaac*, 456 U.S. at 129; *see also Hines v. Enemoto*, 658 F.2d 667, 673 (9th Cir. 1981). Even where instances of prosecutorial misconduct are properly objected to at the state trial, a federal court is limited to determining solely whether the defendant was denied due process. *Donnelly v. DeChristofoto*, 416 U.S. 637, 642 (1974). The touchstone of due process is the fairness of the trial, not the misconduct of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219-220 (1982).

Petitioner has effectively defaulted on those alleged instances of prosecutorial misconduct which were

not objected to at trial. Failure of counsel to object to a prosecutor's statements for the strategic reasons does not satisfy the "cause" prong of the *Sykes* standard, and petitioner's argument, that his counsel failed to object at trial because he did not want to be continuously overruled, amounts to a failure to object for strategic reasons. *See Hines*, 658 F.2d at 673. In addition, although petitioner has preserved his claim that the prosecutor's references to first degree murder in his closing argument constituted misconduct, petitioner has made no showing of a constitutional violation. Petitioner has not demonstrated that his trial was rendered so fundamentally unfair by the prosecutor's remarks that due process was denied. *See U.S. v. Foster*, 711 F.2d 871, 883 (1983); *Thomas v. Cardwell*, 626 F.2d 1375, 1381 (9th Cir. 1980).

5. Denial Of Discovery

In his petition, petitioner argues that the prosecution's violation of a discovery order denied him his constitutional rights to a fair trial.[4/] The discovery order in question called for the prosecution to release all statements made by petitioner to police officers during any of the questioning preceding trial. Petitioner made a statement at his apartment in response to Officer Lapic's

4. This claim is properly before the Court at this time even though the claim was not included in this Court's earlier Order to Show Cause. Petitioner's counsel has fully briefed the issue for this Court, and the Court finds that it is able to make a determination of this claim after careful review of petitioner's arguments and of the record before the Court.

questioning regarding the origin of the baby's bruises, that "Maybe some Mexicans came through the door." This statement was not revealed to the defense before Officer Lapic testified at trial. Petitioner contends that the prosecutor's failure to comply with the discovery order and reveal the statement before trial violated his due process rights for two reasons. First, petitioner claims that the revelation of Officer Lapic's questioning regarding the origin of the bruises could have been persuasive to the trial court at the Motion to Suppress that the interrogation violated *Miranda*. According to petitioner, Officer Lapic's questioning indicated that the officer knew the criminal degree of force used upon the body. Second, petitioner maintains that his lack of awareness of the statement regarding Mexicans left his counsel "ill-prepared" to select the jury.

The Court finds that petitioner's claims lack merit. Even considering Officer Lapic's questioning of petitioner, this Court finds that the interrogation of petitioner did not violate his *Miranda* rights. In addition, this Court finds that counsel's lack of awareness of petitioner's statement did not violate petitioner's due process right to an adequate opportunity to voir dire the jury. Therefore, petitioner is not entitled to relief on his claim for violation of the discovery order.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is denied.

IT IS FURTHER ORDERED that petitioner's motion for reconsideration of application for bail pending determination of petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

DATED: July 15, 1987

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE,	)	
Plaintiff-Appellant,	)	No. 87-2522
	)	
v.	)	D.C. No.
	)	CV-85-6521-TEH
WAYNE ESTELLE,	)	
Warden,	)	ORDER AND
Defendant-Appellee.	)	DISSENT
	)	

Filed November 23, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

ORDER

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judges Kozinski and Trott would grant the suggestion for rehearing en banc.

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the suggestion for an en banc. An active judge requested a vote on whether to rehear the matter en banc. The request failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DISSENT

KOZINSKI, Circuit Judge, with whom Circuit Judge TROTT joins, dissenting from the order rejecting the suggestion for rehearing en banc.

Six month old Tori McGuire died in a hospital emergency room, the victim of appalling internal injuries: her liver was split in half, her pancreas was lacerated and split apart, her lower right lung and the large vein from her heart were damaged, and part of her large intestine was lacerated. No, little Tori was not the victim of a hideous automobile accident; nor had she been extracted from the rubble of an earthquake. She had been beaten to death. Her lifeless body, with dozens of contusions on her chest and abdomen, was brought to the hospital by her parents who claimed they didn't know what could have happened to her. Perhaps, the father said, "the baby fell off the couch" or maybe "some Mexicans" broke in and abused her while he was out of the room. Not taken in by these transparent falsehoods, the state brought charges against the father, Mark McGuire. A state jury convicted him of second degree murder; the conviction was affirmed on appeal.

A panel of this court now overturns the conviction, quite possibly forever. In so doing, it not only reaches a result that is contrary to simple justice and common sense, but does so in a way that will seriously interfere with the authority and autonomy of the state courts in many other criminal proceedings. Most fundamentally, the panel overturns the state conviction because it disagrees with the state court on questions of *state* law.[1/] Worse, the panel punishes the prosecution for introducing what the court deems to be unnecessary evidence of the defendant's intent, even though intent is clearly an element of the crime with which McGuire was charged. Finally, the panel misapplies the teachings of *Chapman v. California*, 386 U.S. 18 (1967), and *United States v. Hasting*, 461 U.S. 499 (1983), by failing to consider "the entire record prior to reversing a conviction for constitutional errors that may be harmless." *Id.* at 509 n. 7.

This opinion is markedly out of step with the law of the Supreme Court and this circuit governing these sensitive and important issues. While en banc procedures are cumbersome and time consuming, such considerations ought not deter us from maintaining uniformity in the law of the circuit, as well as correcting an obvious miscarriage

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1. A similar concern was raised by *Blair v. McCarthy*, 881 F.2d 602 (9th Cir. 1989, *cert. granted*, 59 USLW 3210 (Oct 2. 1990)(No. 89-1862), vacated as moot and remanded ___ USLW ___ (1990), where the first question presented was: "Has court below improperly and unduly expanded scope of federal habeas corpus relief by granting such relief in absence of any federal violation on sole basis of alleged violation of state procedural rule plus finding that it is 'reasonably probable' that different result would have occurred in absence of state law error?"

of justice. Because my colleagues' decision not to take this case en banc lets stand what I consider to be a wholly unacceptable precedent, I must respectfully dissent.

Discussion

Tori McGuire's short life was the type of horror no sentient being should have to endure. In addition to the ghastly injuries that caused her death, the doctors who examined her discovered some earlier injuries -- rectal tearing that was at least six weeks old and several partially healed rib fractures that were approximately seven weeks old. The prosecution introduced evidence of these earlier injuries, and the trial court instructed the jury as to the inferences it could draw therefrom. This evidence and these instructions lie at the heart of the panel's decision to overturn the conviction. A dispassionate review of the state court proceedings, however, reveals that no error at all was committed, much less an error of constitutional dimensions, and that the disputed evidence was, in any event, not prejudicial given the overwhelming evidence of McGuire's guilt.

A. The Panel Second-Guessed The State Courts On Questions Of State Law

This is not an appeal from a federal criminal conviction; it is a state habeas corpus case. Our function is limited to determining whether the petitioner's constitutional rights were violated. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir.), *cert. denied*, 110 S.Ct. 344 (1989);

Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). In making that determination, we do not review issues of state law, such as evidentiary rulings; we are bound by the state courts' interpretations of the law entrusted to them. The panel disregards this limitation entirely and overturns Mark McGuire's conviction because it disagrees with the way the state court resolved questions of state law concerning the admissibility of evidence and the wording of jury instructions.

On the evidentiary question, the state trial court admitted proof of prior injuries for three separate reasons, one of them being that it tended to establish that Tori was a battered child, pursuant to a theory known as the "Battered Child Syndrome." The state court of appeal affirmed:

> [P]roof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

People v. McGuire, No. A017800, at 7 (Cal.App. Jan. 15, 1985), citing and discussing *People v. Bledsoe*, 36 Cal.3d 236 (1984); *People v. Jackson*, 18 Cal.App.3d 504 (1971); and *Landeros v. Flood*, 17 Cal.3d 399 (1976). Our panel flatly disagrees with this determination:

> The trial court incorrectly admitted the evidence *pursuant to California law* allowing past injury evidence to establish the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506,

95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

901 F.2d at 754 (emphasis added).

What can one possibly say about this? The panel not only expressly states that the state court erroneously admitted the evidence "pursuant to California law," but it relies on two of the same cases that the state court of appeal relied on in reaching the opposite conclusion. Until reading the panel's opinion, I had thought the federal courts were bound by state court interpretations of the state rules of evidence. Apparently, however, the panel has now declared open season on state court evidentiary rulings in the Ninth Circuit.

The panel makes precisely the same mistake when it concludes that "[s]ubsection 3 of the [prior bad acts] instruction is erroneous." 902 F.2d at 755. The panel's only explanation for this conclusion appears in a footnote:

> It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

Id. at 755 n. 2. Once again, the panel cites only state law in support of its conclusion that the state courts committed error.

The panel does ultimately conclude that "the faulty instruction considered along with the admittance of the prejudicial evidence 'so infected the entire trial that the resulting conviction violate[d] due process.'" 902 F.2d

at 755 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). This reference to the due process clause does not repair the damage done by the panel's earlier analysis. The problem is that, in order to conclude that there was a due process violation, one must first determine that the state trial court erred. The panel made that initial determination by relying almost exclusively on state law, which it reads in a way directly contrary to the state court's reading.[2/]

B. *Evidence Of Intent Was Proper And Necessary*

In concluding that the evidence of prior injuries was improperly admitted, the panel suggests that the evidence was not relevant. *Id.* at 754. As discussed above, the panel had no business second-guessing the state courts on a question of state law. Having started down this path, however, the panel makes a collateral error, one with grave constitutional implications.

As the panel recognized, evidence is admitted pursuant to the Battered Child Syndrome theory to prove that the death was not accidental. *Id.* If the child has

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2. I say *almost* exclusively because the court does sprinkle in citations to federal law, particularly the Federal Rules of Evidence. *See, for example*, 902 F.2d at 754 (citing FRE 404(b) and *United States v. Lewis*, 837 F.2d 415 (9th Cir.) *cert. denied*, 488 U.S. 923 (1988)); *Id.* at 755 (citing FRE 404(a) Advisory Committee note and *United States v. Green*, 648 F.2d 587, 594 (9th Cir. 1981)). The Federal Rules of Evidence, the Advisory Committee notes, and federal criminal cases are, of course, wholly irrelevant to a state habeas case, where the only issue is whether the trial violated constitutional norms. The panel's opinion in this case could well be construed as giving the Federal Rules of Evidence a constitutional cast. *See id.* at 755.

suffered a series of injuries as the result of child abuse, this tends to make it less likely that the injury in question resulted from a mishap. *People* v. *Jackson*, 18 Cal.3d 504, 507, 95 Cal.Rptr. 919, 921 (1971). The panel concludes that the evidence of prior injuries was irrelevant because "in the instant case, no claim was made that the child died accidentally." *Id.* According to the panel, the only issue at trial was *who* killed Tori, not whether the killing was intentional.

This passage in the panel's opinion has serious implications: It suggests that due process may be violated by the admission of evidence which clearly goes to an element of the offense charged if it turns out that the defense does not put that particular element in issue. This reasoning, if it stands as the law of the circuit, will present state prosecutors with an intractable problem: Just how are they to know whether the defendant intends to put a particular element of the crime in issue? After all, the prosecution must go first and bears the burden of establishing every element of the crime beyond a reasonable doubt -- including, for second degree murder, malice aforethought, Cal. Penal Code §§ 187, 189 (West 1988). If the prosecution decides not to present proof of any element of the crime on the theory that the defense will not put that element in issue, the defendant automatically becomes entitled to a directed verdict of acquittal. James W. Moore and Jo D. Lucas, 5A *Moore's Federal Practice* ¶ 50.02[1] at 50-16.1 to 50-17 (2d ed. 1990). The simple reality is that, in a criminal case, *every* element of the crime is in issue; the defense is free to sit back and see how the prosecution's case shapes up, and then focus its attack where the prosecution is weakest.

The panel's insistence that intent was not an issue in the case is contradicted not only by elementary principles of criminal procedure, but by the record in this case as well. As the panel recognizes, McGuire at one time claime[illegible]he baby was injured when she fell off the couch. [illegible].2d at 751. He later suggested that "maybe some Mexicans came in while I was upstairs." *Id.* How on earth was the prosecutor to know that McGuire would not raise one of these defenses when his turn came to put on evidence?"[3] More fundamentally, if the prosecutor decided to play it safe by introducing evidence in addition to the fatal injuries to prove that the death was not accidental, how can we say that the evidence was irrelevant? For the panel to look at the evidence after the case was closed and say that the prosecutor was too cautious in proving every element of the offense is nothing but 20/20 hindsight.[4]

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3. Indeed, early in the trial the prosecutor advised the court that he anticipated the defense would rely primarily on the "some Mexicans" theory, with "try[ing] to hang it on momma" a less likely alternative. Reporter's Transcript on Appeal, *People of the State of California v. McGuire*, H 3748 (RT) 213-24 (Book II).

4. As it turns out, the defense *did* raise the issue of intent, and very vigorously. Defense counsel objected to a jury instruction on second degree murder, stating "I don't think there is evidence of intent." RT 562 (Book V). She requested an involuntary manslaughter instruction, stating "my contention is that whoever killed the baby or hit the baby had no malice, had no intent to kill the baby." RT 619. With the agreement of both sides, the court instructed the jury that "[t]he unintentional killing of a human being is excusable and not unlawful when committed by accident," and that "[t]he burden is on the Prosecution to prove beyond a reasonable doubt that the homicide was not excusable." RT 762. During her closing argument, defense counsel argued that the prosecution had failed to establish intent: "Involuntary manslaughter . . . is an

What are state prosecutors in the Ninth Circuit supposed to do when presented with a situation such as that here? On the one hand, they face the possibility of a directed verdict or unfavorable jury instruction if they fail to prove an element of the case that somehow seems "obvious." On the other hand, under today's precedent, they face the possibility that a federal court -- with the benefit of hindsight -- will conclude that the evidence was not really necessary because that particular element of the crime was not contested by the defense. It is obvious that the McGuire prosecutor could not have guarded against this type of whipsaw; more troubling is that, even with today's precedent in hand, no prosecutor will know when to withhold evidence or when to include it until he sees the defendant's evidence, by which time it will be too late. In common parlance, this is known as a Catch-22.

C. *Panel's Harmless Error Analysis Is Deficient*

It is well established that errors, even constitutional ones, do not warrant overturning a state conviction unless it is determined that the errors are not

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unlawful killing of a human being where there is no intent to kill and no malice. That is what we have here, if anything." RT 720. See also RT 718-19. In McGuire's motion for a new trial after the verdict came in, defense counsel asserted that the trial court had erroneously failed to instruct the jury on the requirement of specific intent. Clerk's Transcript on Appeal, *The People of the State of California v. McGuire*, H 3748 (CT) 155. Thus, while the panel appears to have labored under the misapprehension that McGuire had conceded or stipulated to intent, defense counsel was well aware of the state's burden of proof as to McGuire's state of mind, and pressed the issue forcefully.

harmless. *Chapman v. California*, 386 U.S. 18-33 (1967). Except where the error is so fundamental that it is deemed harmful per se, which is not the case here, the federal court must examine the *entire* state court record to determine whether the jury would have reached a different conclusion absent the error. *United States v. Hasting*, 461 U.S. 499, 509 n. 7 (1983).

The panel here speaks the language of harmless error analysis but fails to perform the tasks associated therewith. The sum and substance of the panel's harmless error "analysis" is the following: "Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming." 902 F.2d at 755. The panel does not state that it has reviewed, or even seen the state court record; it does not discuss the evidence supporting guilt; and it does not analyze how the trial would have played out had the perceived errors been eliminated. Harmless error analysis that is so utterly devoid of analysis is no better than no harmless error analysis at all. At a bare minimum, it seems to me, the panel must represent that it has ordered the state court record, looked at it, and undertaken the type of review mandated by the Supreme Court.

Quite frankly, it is impossible to review the record in this case and understand how the panel reached its conclusion. Take, for example, the error perceived by the panel as to the admission of the evidence under the Battered Child Syndrome. Even if the panel were correct in concluding that the evidence was improperly admitted for this purpose, *it does not matter*. The trial court found the evidence of prior injuries admissible for three distinct purposes: (1) to establish the existence of Battered Child

Syndrome; (2) to show that McGuire had committed similar prior bad acts;[5] and (3) to impeach Mrs. McGuire's testimony that Mr. McGuire was kind to his daughter. RT 573-75 (Book V), 757. The state court of appeal found the evidence admissible on the first of these grounds, and so did not reach the other two. *People v. McGuire*, No. A017800, at 5-7 (Cal.App. Jan. 15, 1985).

Where a trial court admits evidence for three independent reasons, and we find one of them insufficient, our job is hardly done.[6] All evidence is admissible for some purposes but inadmissible for others; we could reverse convictions any time we liked were we to focus on one purpose exclusively. Here, the panel did not find the evidence was inadmissible on the other two grounds; therefore, it is bound to assume that the evidence would have been admitted in any event. In light of the indisputable record on this point, I fail to see how McGuire suffered *any* prejudice from the alleged error

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5. The trial court treated Battered Child Syndrome and prior bad acts as separate evidentiary categories; it may be more accurate to say that evidence of Battered Child Syndrome is a subset of evidence of prior bad acts. For our purposes it makes no difference: A finding that evidence is inadmissible to prove Battered Child Syndrome says nothing about whether the evidence may be admitted for the broader purpose of showing prior bad acts.

6. That the state court of appeal only considered one ground for admission is not, of course, dispositive. Having found the evidence admissible on one ground, the court of appeal had no need to examine whether the evidence was admissible on other grounds as well. To find the evidence inadmissible -- and so highly prejudicial as to constitute a due process violation -- we must make sure that it is not in fact admissible on *any* of the grounds relied on by the trial court.

regarding admission of evidence of the Battered Child Syndrome, much less a denial of due process.

But there is more. Even were we to assume, with the panel, that admission of the evidence was prejudicial error, the panel was required to decide whether the jury would have convicted anyway. See *United States v. Hasting*, 461 U.S. at 510-11. A determination on this issue required the panel to weigh the prosecution's case, the likely effect of the wrongfully admitted evidence and the likelihood that the jury would have come to a different result. A review of the record leads only to one conclusion: The jury would have reached exactly the same verdict regardless of the errors perceived by the panel.

First, the record discloses that the prosecution's case was very strong indeed. In weighing the strength of that evidence, it must be kept in mind that there were only two plausible theories of the case: that the father abused Tori or that the mother did; no one else had access to the baby immediately prior to her death. While the 1500 page trial transcript contains a good deal of testimony establishing that the father did it, perhaps the strongest piece of evidence is the testimony of several witnesses who overheard a conversation between Mr. and Mrs. McGuire at the hospital while the couple was waiting to learn Tori's fate:

> While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he

> "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

People v. McGuire, No. A017800, at 3 (Cal.App. Jan. 15, 1985).

This conversation makes no sense at all unless it was the father who abused the baby. Had the baby been alone with the mother at the time she suffered the injuries, as Mrs. McGuire claimed at trial, one would have expected the accusations at the hospital to point entirely the other way. Not only did McGuire fail to question or accuse his wife, he lamely suggested the baby "fell off the couch" and did not protest her accusation that "you are responsible." Short of a videotape of the crime, it's not clear what better evidence the prosecution might have presented.

The fact is, child abuse cases are inherently difficult to prove: the evidence is usually circumstantial and often ambiguous; eyewitnesses seldom come forward because of family considerations; and the victims often are dead or too young to speak. See, for example, *United States v. Boise*, No. 89-30071, slip op at 12157 (9th Cir. September 27, 1990). It is rare indeed to have a case like this one, where the defendant makes what is tantamount to a spontaneous confession of his guilt. When this conversation is viewed in the context of all the other evidence presented to the jury, see *People v. McGuire* at 2-4, one must conclude that the prosecution's case was extremely strong.

Second, the prejudice flowing from any error would have been minimal. If I understand the panel's

rationale correctly, it is that the prosecution failed to sufficiently prove McGuire's connection to the earlier acts of child abuse. Even if that were true -- which it clearly is not[7] -- how was the defendant prejudiced? Evidence of the earlier abuse could *only* harm the defendant to the extent the jury was convinced he committed those acts. If the jury was in doubt, or believed that someone else (for example, Mrs. McGuire) committed the bad acts, its outrage over them would not have been directed at Mark McGuire.

Finally, it is highly unlikely that, absent the error, the jury would have reached a not guilty verdict because to do so it would have had to adopt the defense's alternative theory -- that the mother did it.

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7. The record contains ample evidence from which a rational jury could conclude that McGuire had been the perpetrator of the earlier injuries:

> -- Mrs. McGuire's statements to Detective Gillis to the effect that, when she bathed Tori, she noticed the child had bruises on her body. When asked how Tori might have gotten those bruises, Daisy responded:
> **McGuire:** I don't really know, you know, I am not the only one who is taking care of her.
> **Gillis:** Well, who else is taking care of her?
> **McGuire:** My husband, too, takes care of her.
> -- Testimony by a neighbor "that she had observed McGuire pick up the infant by 'one of her arms.' She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other 'bad things.' Mrs. McGuire, the witness said, was a 'very caring mother' toward Tori, who was never seen to 'abuse the child' in any way."

People v. McGuire, No. A017800, at 4 (Cal.App. Jan. 15, 1985).

> -- The fact that one of the injuries -- rectal tearing -- is sexual in nature, and of a type more likely made by a man than a woman.

Mrs. McGuire's "confession," made only after she was granted immunity and had the luxury of attempting to save her husband at no risk to herself, is halting and tentative, marked by evasion and lapses of memory. RT 333-39, 341-42, 351-58, 364, 385. It is also internally inconsistent, RT 353-56; contradicted by her earlier statements to the police and at the preliminary hearing, RT 370-75, 410-11, and by Mr. McGuire's own statements to the police, RT 209-10 (Book II), 251 (Book III); and inconsistent with the weight of the medical evidence.[8] The jury deliberated for three days and had extended passages of the trial transcript read back to it, including large portions of Mrs. McGuire's testimony. RT 254A (Book I), 777. This jury was clearly not inflamed by passion. McGuire got no worse than he deserved.

It is this type of inquiry, or something akin to it, that the panel was required to pursue under *Chapman*. Its unsubstantiated assertion that the evidence against McGuire "was certainly not overwhelming" simply does not do the job.

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8. Mrs. McGuire claimed to have killed the baby some time in the afternoon, "[a] long time" before her husband returned home. RT 353; *see also* RT 348; *but see* RT 356 ("I beat my child when he, shortly before he comes home on that evening."). The infant most likely died within minutes of having been beaten. RT 139-140 (Book II). Yet when the McGuires took the baby to the hospital at nine in the evening, RT 87 (Book II), the doctors believed they had a chance of resuscitating the child because irreversible brain swelling had not yet begun, indicating that her death was very recent. RT 86, 98-99, 169-71 (Book II).

D. *Reprosecution Of McGuire May Be Precluded*

When a federal court grants a writ of habeas corpus, the state normally has the option of retrying the defendant. This is not the case, however, when there is a determination that the prosecution failed to meet its burden of proof on any element of the offense; under those circumstances, retrial is barred by the double jeopardy clause. *Burks v. United States*, 437 U.S. 1 (1978).

While the point is not entirely free from doubt, the opinion contains statements that could well preclude retrial of McGuire. Specifically, the panel casts aspersions on the prosecution's case by stating that "only the barest threads connect McGuire to the crime." 902 F.2d at 755. Worse still, the panel characterizes the state's evidence as suggesting no more than "mere shadows of guilt which *leave ample room for reasonable doubt*." *Id.* at 756 (emphasis added).

It is entirely possible that the state courts on remand will read these passages as holding that the prosecution failed to introduce sufficient evidence to meet its constitutional burden of establishing guilt beyond a reasonable doubt. Certainly it would be difficult to come up with language more clearly conveying this idea than that used by the panel. If the state court *does* construe the panel's opinion as precluding a retrial, there will be no possibility of correcting the error. Once McGuire is released, the prosecution has no mechanism for coming into federal court to complain, as the state is not entitled to collaterally attack the state judgment.

Conclusion

The panel has overturned a state conviction, and has done so in a manner that seriously and unjustifiably interferes with the authority of the state courts, hamstrings state prosecutors and may result in the permanent release of a defendant who was justly and properly convicted of a heinous crime. We make a grave mistake by failing to take the case en banc to correct these errors and set the law of the circuit back on course.

APPENDIX E

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	FILED: 12/10/87
Plaintiff and Respondent,	)	A017800
v.	)	(Alameda County Super. Ct.
MARK O. McGUIRE,	)	No. H 3748)
Defendant and Appellant.	)	

Defendant Mark O. McGuire was convicted by a jury's verdict of the second degree murder of his six-month old infant daughter, Tori. He appeals from the judgment which was entered upon the jury's verdict.

We affirm the judgment for the reasons we now state.

Evidence adduced at the trial, presumably found true by the jury, revealed the following.

Defendant McGuire, and his wife, Daisy, brought their infant child Tori into the emergency room of an Alameda County hospital one evening. The child was bluish in color, not breathing, and bruises appeared upon

her body. Her father, McGuire, explained that Tori suffered recently from a cold, and had that evening injured herself when she fell from a couch. Prompt medical measures of doctors and nurses were unavailing, and Tori died within the hour.

McGuire was thereafter charged with the murder of the child.

Expert medical witnesses at the trial testified to the following. When Tori was brought to the hospital, she indicated little or no signs of life, her body was cool, and she showed no heartbeat or pulse. She had a "relatively recent" bruise on her chest, with older multiple bruises around it. And there were blue marks on the infant's ears, and scar tissue indicating a tearing wound of her rectum.

An autopsy on Tori disclosed at least 17 separate contusions on her chest and around 30 in her abdominal area. There were "quite fresh," and suggested "perhaps the knuckles or fists striking the skin." An examination of her internal organs revealed that her liver had been split in two, her pancreas was lacerated and almost torn in half, her right lung and a large vein near the heart were damaged, and her lower intestine was lacerated. And she had several partially healed rib fractures. Such injuries appeared to have been caused by the same force or blows which caused the outer injuries. The injuries could not have been caused by a fall from a couch; and nothing but the application of "blunt force to this child" could have caused them. A medical witness said: "I don't think you can separate injuries, one from another, those types of injuries. A tremendous number of contusions all over the

front of the body, the neck area, and the injuries to the abdomen are totally inconsistent with falling even 16 feet."

The child's rectal injury was at least six weeks old, and was unlikely to have been caused by passage of hard stools; more likely it was caused by "the forceful insertion of a finger, or foreign object, or both."

The consensus of the People's professional medical witnesses was that Tori was a "battered child."

Tori had been in the custody of McGuire and her mother during the entire six months of her life.

While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

To police officers McGuire explained that "the baby must have fallen and struck the walker." And when an officer expressed doubt that her condition was consistent with a fall, McGuire said "maybe some Mexicans came in."

McGuire denied striking or abusing the child.

Mrs. McGuire testified at the trial. For the first time, there she said that she had been mad at Tori because of her crying, and had hit her on the day of the baby's death.

A neighbor of the McGuires, in the same apartment building, testified at the trial to matters occurring before Tori's death. She had "heard some ruckus and normally at that time there is just doors closing and cars starting up to go to work, but this time I

heard noises, voices saying please don't, please don't, I got up and looked out my bedroom window and I saw Mark [McGuire] having Daisy [McGuire] up against the wall with his legs to her stomach, choking her and she is trying to pull away." On another occasion Daisy appeared "rather upset and she had looked as if she was crying because I saw the tears from her eyes. [She said that Mark had] hit her across the face."

The neighbor testified also that she had observed McGuire pick up the infant by "one of her arms." She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other "bad things." Mrs. McGuire, the witness said, was a "very caring mother" toward Tori, who was never seen to "abuse the child" in any way.

And evidence indicated that McGuire and his wife were the only persons with Tori on the day of her death.

We state McGuire's several appellate contentions as phrased by him.

I. Contention: "The trial court erred in admitting evidence of prior injuries which were in no way tied to appellant."

It was the People's theory that Tori's death was brought about by McGuire's "child battering," which culminated in the events of the day of her death. And proof of the "battered child syndrome," has expressly been held admissible in this state.

A leading case on the subject, *Landeros* v. *Flood*, 17 Cal.3d 399, 408, has stated: "It appears from the literature that the battered child syndrome was first tentatively identified and reported to the medical

profession in the early 1950s. Further surveys and analyses of the syndrome followed. . . . California courts have not been oblivious to this development. In a prosecution for child abuse reviewed in 1971 -- the same year as the events here in issue -- the Court of Appeal held admissible the testimony of a physician identifying the typical elements of the battered child syndrome. (*People* v. *Jackson* .(1971) 18 Cal.App.3d 504, 506 [95 Cal.Rptr. 919].) The court explained that a physician's diagnosis of battered child syndrome essentially means that the victim's injuries were not inflicted by accidental means, and 'This conclusion is based upon an extensive study of the subject by medical science.' (*Id.*, at p. 507.) Citing portions of the literature referred to hereinabove, the court concluded (*ibid.*) that 'the diagnosis of the "battered child syndrome" has become *an accepted medical diagnosis*.' (Italics added.) Indeed, the Court of Appeal added that 'Trial courts have long recognized the "battered child syndrome" and it has been accepted as a legally qualified diagnosis on the trial court level for some time. . . .' (*Id.*, at pp. 507-508; . . .)"

And more recently the high court in *People* v. *Bledsoe*, 36 Cal.3d 236, 249, has said: "In *People* v. *Jackson* [18 Cal.App.3d 504] -- the first such case in California -- the court explained that '[t]his syndrome means that a child has received repeated and/or serious injuries by non-accidental means. . . . [T]he criteria for the "battered child syndrome" . . . are (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given

that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect . . . [¶] A finding . . . of the "battered child syndrome" . . . simply indicates that a child found with the injuries outlined above has not suffered those injuries by accidental means.' (18 Cal.App.3d at pp. 506-507.) As this description suggests, the battered child syndrome cases fall well within the mainstream of a long line of California decisions which permit an expert medical witness to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself. . . ."

Under this authority, proof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

II. Contention: "Mistrial should have been granted when the highly inflammatory 'Mexican intruder' statement was elicited at trial."

McGuire argues that disclosure of the "inflammatory Mexican intruder statement" was not timely made to him under the trial court's discovery order.

As earlier noted, a uniformed police officer, not assigned to investigate the case, had commented to McGuire that the child's injuries seemed inconsistent with a fall from the couch. It was then that McGuire said, "maybe some Mexicans came in." The officer, believing the remark of no importance, made no note or report of it, and the prosecutor did not learn of the remark until a few minutes before it was offered in evidence at midtrial. The remark was relevant evidence, susceptible of an

inference that such an absurd explanation might indicate a consciousness of guilt.

The trial court, following a hearing, concluded that there had been no intentional violation of the discovery order, and that the evidence's tardy disclosure was excused. The following courtroom colloquy took place.

"The Court: Let me ask you this. Since he didn't have this information before and didn't have an opportunity to give you this discovery before, if you have got a surprise element, then what do we need to enable you to deal with this situation? . . . If you need some time to do some investigation or check anything else out brought out of the surprise element, I am willing to give you that. But as far as if you want to wait until your cross-examination and have somebody check something out or do anything, I am willing to accommodate you that way.

"Ms. Simpson [defense attorney]: I would be asking for some kind of instruction.

"The Court: Before we do that, why don't you do your investigation or whatever it is, if you are asking for time, then let's deal with it and then when we come back then we can decide how to best handle it. It may be something that you are going to get anyway in the natural course of things. If you could have gotten it in the natural course of things, then it may not be that damaging. . . . I feel that if there is a need for you to have further time to investigate into the origin and scope of this comment that is alleged to be made by your client, then I am willing to accommodate you.

"Ms. Simpson: I would like to have that opportunity.

"The Court: Okay. Can you do that by tomorrow morning?

"Ms. Simpson: I think I probably can."

We perceive neither abuse of discretion,nor error, in the trial court's resolution of the problem.

III. Contention: "The trial court erred in admitting appellant's statement which was the fruit of an unconstitutional interrogation."

On the evening of Tori's death, police officers, investigating the case, had questioned both McGuire and his wife. At that point McGuire was *not* under arrest or in custody; he had been so informed and the police had no intention of arresting him. And the *Miranda* admonition was *not* given. The couple were then asked to come to the police station the following day, and the decision to appear was theirs. Both parties "readily agreed." But by the time of their police station visit the next day, suspicion had focused on McGuire. Before any questioning, he was given an appropriate *Miranda* admonition, and the parties reiterated their earlier statements.

McGuire's instant argument is that the *first* police inquiry was in violation of *Miranda*, and that his subsequent Mirandized statements, offered in evidence at the trial, were its unconstitutional "fruits." The superior court had disagreed.

"[T]he trial court's ruling on a *Miranda* issue may not be set aside by us unless it is 'palpably erroneous.'" (*In re Eric J.*, 25 Cal.3d 522, 527.)

In ruling that McGuire's questioned statement might be admitted in evidence, the trial court stated: "There is nothing in here to indicate any reluctance on the part of the McGuires to go there. Their child had just died and there was an inquiry as to what was the cause of death. Nobody knew anything at that particular point in time. They were just trying to gather information. It was not until Dr. Herrmann does an autopsy that they become aware of the fact that there were multiple bruises and this was the cause of death. At that point in time, he was Mirandized and he was given his rights and gave a statement."

The *Miranda* requirement applies only to "custodial interrogation." In *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495, the nation's high court stated:

"Our decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' 384 U.S. at 444. Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense. *Mathis* v. *United States*, 391 U.S. (1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. . . ."

The trial court's comment was well supported by law, and by the record. Its ruling was *not* "palpably erroneous."

IV. Contention: "Prosecutorial misconduct was so prejudicial that appellant was denied a fair trial."

McGuire makes four assignments of such misconduct.

It is first argued that the prosecutor charged in his jury argument, that Mrs. McGuire's "confession" that she had "hit" Tori on the date of the child's death, was fabricated. Such a statement had some record support. It was accordingly not misconduct.

It is also argued that "the D.A. implied that court rulings were incorrect." We find nothing in the record reasonably supportive of the argument. And the prosecutor's reference to first degree murder was patently harmless, for, as noted, the jury's verdict was of second degree murder.

Moreover, we note that as to *three* of the four assignments, no trial court objection was made, and that as to *all* of them no alleviating jury admonition, which surely would have dispelled any conceivable prejudice, was sought. The misconduct charges are for those reasons not cognizable on appeal. (*People* v. *Green*, 27 Cal.3d a, 27-36.) And as said in *People* v. *Fosselman*, 33 Cal.3d 572, 581: "[G]enerally such [claims of misconduct] are deemed waived if the defendant does not object to them at trial. . . . He may raise the issue for the first time on appeal only if the trial court could not have cured the harm flowing from the misconduct by a prompt admonition to the jury. . . . In the present case the harm could have been cured by timely warnings, and hence defendant may not now be heard to complain."

The judgment is affirmed.

Elkington, Acting P.J.

WE CONCUR:

Newsom, J.

Holmdahl, J.

Supreme Court, U.S.
FILED
FEB 4 1991
OFFICE OF THE CLERK

NO. 90-1074

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN

Petitioner,

v.

MARK OWEN McGUIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was there a denial of due process of law under the Constitution of the United States when evidence of prior injuries to the victim were admitted without evidence linking Respondent to the prior injuries and the jury was instructed to use that evidence to convict him?

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent, Mark Owen McGuire, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported that McGuire v. Estelle, 902 Fed.2d 749 (9th Cir. 1990) and attached to the Petition for Writ of Certiorari.

On July 7, 1981, Mark and Daisy McGuire brought their lifeless six month old daughter Tori McGuire, into the emergency room of Kaiser Hospital in Hayward, California. The child was immediately taken in for emergency treatment and the screening nurse took a history. The history provided by the parents to the screening nurse was inconsistent with the injuries presented. The police were called by emergency room personnel because they were presented with a bruised, lifeless baby and an inconsistent history. The condition of the child and the inconsistent history are indicia that the child died of child abuse. The only real question was who did it.

The police instructed emergency room personnel not to tell the McGuires that Tori was dead. The police then questioned Mark and Daisy McGuire and searched their home. Nearly two hours after the initial questioning, the parents were told that their child was dead.

Statements were obtained from Mark and Daisy McGuire without benefit of Miranda warnings, under the pretext that the police were merely investigating and did not yet know a crime had been committed. Miranda v. Arizona, 384 U.S. 436 (1965). In the course of these interviews, McGuire made statements denying knowledge of and speculating as to the source of the injuries to the baby. McGuire did not testify at trial.

The statements made by McGuire to the police were introduced in the prosecution's case in chief. The prosecutor then introduced prior injuries to the victim to rebut a potential defense of accident. Neither the statements nor the injuries were necessary to establish the corpus delicti of murder, or the Battered Child Syndrome.

At the preliminary hearing Daisy McGuire refused to testify without benefit of transactional immunity. Without questioning Daisy with regard to her testimony, the prosecutor gave her transactional immunity. Daisy did not implicate Mark McGuire at the preliminary hearing. She was not asked and did not deny hitting the baby herself at the preliminary hearing. The only time she denied hitting the baby was when she was questioned by the police before she was told that Tori was dead. At trial, still with benefit of transactional immunity, Daisy testified that she herself had hit the baby. She said that it was hot, she was

pregnant, the TV was broken, and she beat the baby until she stopped crying.

Incidents of violent arguments between Mark and Daisy were then introduced to impeach her testimony for the purpose of establishing that she was afraid of him. Daisy never retracted her story even though their son, born after the preliminary hearing, was adopted due to her testimony that she beat Tori.

Evidence of prior injuries to Tori McGuire, including healing rib fractures and rectal tearing, was initially admitted for the limited purpose of establishing the Battered Child Syndrome. In spite of the initial limited purpose, there was no limiting instruction. The jury was instructed that if it connected McGuire with the "other offenses," including the prior injuries to the baby and prior violence to his wife, it could find him guilty of murder. The Court elected to permit the jury to use the Battered Child Syndrome evidence to identify McGuire as the perpetrator of both the prior injuries and the murder. The California Court of Appeal upheld the conviction and the State Supreme Court denied hearing.

McGuire filed a petition for writ of habeas corpus before the United States District Court of the Honorable Thelton E. Henderson. After granting the initial Order to Show Cause, Judge Henderson

denied the petition.

The Ninth Circuit twice reversed the denial of the Writ. In its first opinion, filed May 8, 1989, the Ninth Circuit Panel held that McGuire was denied due process by admission of this evidence and its associated jury instruction. (Petition, A-26.) The Attorney General requested rehearing on the grounds that the panel failed to consider federal authority. (App. B, page 16.)

One year later, the Ninth Circuit Panel wrote a new opinion. The present objection is that the panel relies too heavily on federal authority. Rehearing was denied, and a dissent was published by two Ninth Circuit Justices, who were not on the decision making panel, opposing the denial.

No matter the authority relied upon, state or federal, the use of evidence of prior injuries to the victim, without evidence linking McGuire to the infliction of those injuries, coupled with an instruction to the jury to connect such evidence to the murder is a denial of due process of law.[1]

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[1]See Appendix B, pages 1 and 2 for full text of the California Evidence Code §1101 and the Federal Rules of Evidence §404 for comparison.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH STATE OR FEDERAL LAW REQUIRING THIS COURTS' SUPERVISION

Petitioner argues that the Ninth Circuit ignored the State's interpretation of its own law and relied upon the Federal Rules of Evidence to reverse a state murder conviction. (Pet. 9)

Petitioner fails to comply with the requirements of Supreme Court Rule 10 that the petition specify a conflict with other laws or departure from the accepted course of judicial proceeding calling for this Courts' supervision.

The petitioner misstates the Ninth Circuit Opinion, the state procedures and the history of Battered Child Syndrome cases. Petitioner has argued incessantly that because Battered Child Syndrome evidence is admissible, it must be admitted in this case. The Ninth Circuit Panel understood that the California courts have admitted evidence of Battered Child Syndrome for limited purposes. In reviewing the California cases which permit evidence of the Battered Child Syndrome the Panel recognized that:

> These cases demonstrate that the California Courts have been careful to limit proof of the syndrome to show that the child had not accidentally suffered the injuries. (Pet. A-23)

The evidence was admitted in the trial court without analysis under California Evidence Code §1101(b). In fact, the trial court asked

the prosecutor about §1101(b), and the prosecutor told the court that it did not apply to child murder cases. The Ninth Circuit Panel stated that:

> The prejudicial quality of the evidence was exacerbated by an instruction given to the jury... . This instruction specifically told the jury that if it thought McGuire committed the other two "offenses" they could find him guilty of the charged offense.

The evidence was initially admitted to prove the Battered Child Syndrome. There was no analysis as to its purpose; the court instructed the jury to use it to convict. This denied due process.

II. THE CALIFORNIA AND FEDERAL CASES PERMITTING USE OF BATTERED CHILD SYNDROME EVIDENCE REQUIRE ANALYSIS FOR RELEVANCE AND PREJUDICE.

Petitioner argues that a diagnosis of Battered Child Syndrome "indicates simply that the child did not suffer her injuries by accidental means." (Pet-9)

Battered Child Syndrome was established by the uncontroverted testimony of the emergency room physician and the coroner that the baby was not killed accidentally. There was no conflict or confusion regarding the medical evidence. People v. Wright, 60 Cal.App.3d 6 (1976). There was no question that the child's death was caused by abuse. The prosecutor then introduced, over objection, McGuire's equivocal statements that he did not know how the baby was injured. The prosecutor then used the prior injuries to rebut an anticipated but not forthcoming claim of accident.

The California Supreme Court recognized the Battered Child Syndrome judicially as a medical diagnosis in a civil medical malpractice case. Landeros v. Flood, 17 Cal.3d 409 (1976). Its use was ordinarily confined to cases under the California child abuse statute.[2] The cases relied upon by the trial court, permitting similar conduct to prove non-accidental death, interpreted the child abuse statute. People v. Ewing, 72 Cal.App.3d 714, 717 (1977); People v. Jackson, 18 Cal.App.3d 504 (1970); People v. Shockley, 79 Cal.App.3d 669, 674 (1978); People v. Atkins, 53 Cal.App.3d 348, 360 (1975).

The medical evidence clearly established that this child was beaten to death. Under all authority, federal and state, the admission of prior injuries and prior act evidence must be linked to a specific matter at issue in the case. Petitioner argues that United States v. Boise, permits federal prosecutors to use evidence prohibited to state prosecutors by the opinion set forth in McGuire v. Estelle. United States v. Boise, 916 Fed.2d 497 (9th Cir. 1990). Boise, like all its predecessor cases, allowed evidence of prior

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[2] Penal Code Section 273a states: "(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 3 or 4 years."

injuries only to rebut a fully articulated accident presented by defense medical experts and defense testimony.

The Battered Child Syndrome does not provide evidence of who injured the child. When identity of the primary caretaker is not at issue, it may be used to rebut defenses of accident, misdiagnosis or lack of intent. United States v. Boise, supra, 916 Fed.2d at 503. Ordinarily, the exception is invoked when "the accused admits he did the acts charged, but denies the intent necessary to constitute a crime, or contends that he did the acts accidentally." United States v. Leight, 818 Fed.2d 1297, 1301 (7th Cir., 1987).

McGuire did not introduce conflicting medical evidence. See, e.g., United States v. Boise, supra, 916 F.2d at 500; United States v. Leight, 818 Fed.2d 1297, 1300 (7th Cir., 1987); United States v. Woods, 484 Fed.2d 127 (4th Cir. 1973). He did not contend that the injuries were inflicted accidentally. He did not introduce evidence that his wife committed the crime; she was a prosecution witness, under complete immunity.

The trial court failed to consider whether prior injuries were relevant to any issue in the case, or whether they were simply being used as character evidence. The trial court was persuaded that once it found Battered Child Syndrome, there was no need to

analyze the evidence. The minority dissent states that the evidence was admitted to show that McGuire had committed similar prior bad acts. (Pet. 16, citing A-54). The purpose of the state and federal rules is specifically to prevent use of such evidence for the purpose of showing similar prior bad acts.

As trial counsel argued, and as has been argued throughout the pendency of this matter, this is improper propensity evidence. The argument that the prior injuries are admissible to show prior bad acts bolsters McGuire's contention that this evidence was used precisely for improper, inadmissible purposes. There was no connection between McGuire and the other injuries. Evidence of the injuries was not needed to prove the crime, nor to rebut any defense. They were introduced only to show that he was a bad man who should be convicted of murder.

III. THE NINTH CIRCUIT PANEL DID NOT EXCEED ITS AUTHORITY; DUE PROCESS REQUIREMENTS WERE NOT MET

It is argued that the panel may not "peer majestically over the state court's shoulder." (Pet. 11) It is implied that the Ninth Circuit Panel is reversing the conviction based on violations of the Federal Rules of Evidence.

It is axiomatic that federal courts may intervene in the state judicial process to correct wrongs of a constitutional dimension. Wainwright v. Goode, 464 U.S. 78, 83 (1983). The use of prior

injuries to brand McGuire as a child abuser without any evidence that he previously injured the child, with an instruction that the jury should convict him based on the fact of those prior injuries, deprived him of due process of law.

There is no doubt that the horrific end to Tori McGuire's life is statistically and realistically too common. Regardless of trends and surveys, the Constitution may not be suspended because a crime is particularly repugnant.

> The rule excluding evidence of criminal propensity is nearly three centuries old in the common law... . California's codification of the common law rule (Evid. Code, §1101, subd.(a)) is absolute where it applies.

People v. Alcala, 36 Cal.3d 604, 630-631 (1984).

In this case, the prior injuries were not relevant to any issue in dispute. People v. Thompson, 27 Cal.3d 303-318 (1980). The prosecution posited an anticipated defense in order to permit impeachment of its own evidence. The fact of child abuse was proven and not disputed as the cause of death.

Evidence of "similar" crimes showing violent propensity, including testimony regarding Daisy's fear of McGuire, were tied together through the use of this instruction:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence if believed, was not received, and

may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,

2. To establish the battered child syndrome, and

3. Also a clear connection between the other two offenses and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

In discussing this instruction, the Ninth Circuit Panel determined that "[i]t permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts." (Pet.A-13).

The panel cites the Advisory Committee Note regarding Federal Rules of Evidence 404(a) stating that rejection of such use is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions. (Pet.A-13) Petitioner characterizes this statement as "reliance" on the Federal Rules of Evidence rather than upon the Constitution, thereby expanding the remedy of habeas corpus. This is not the case. The jury went through a process of: 1) finding that Tori was abused; 2) concluding that the death was therefore not accidental; 3) that McGuire lied about an accident defense; 4) indicating a consciousness of guilt; 5) permitting a conviction of murder. (Pet-15) The entire process

hinges on the use by the prosecutor of the un-presented accident defense. This was not impeachment of a testifying defendant. It is argued that the prosecutor must rebut a defense of accident not claimed by the defense to avoid a "Catch-22" situation. Absolutely no authority, federal or state, is cited for the Catch-22 avoidance justification. Prosecutors have a familiar obligation to prove the offense beyond a reasonable doubt.

This is not a case where the panel was reversing a conviction based on the Federal Rules of Evidence to overturn a state conviction. Dowling v. United States, __ U.S. ___, 110 S.Ct. 668, 674 (1990). This is not a case where the writ was issued to correct a perceived error of state law. Pulley v. Harris, 465 U.S. 43, 104 S.Ct. 871, 875 (1984). This is a case where the admission of the evidence and the subsequent instruction "so infected the entire trial that the resulting conviction violated due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

Without this error, Mcguire would have been on trial only for the charged crime of the murder of his child. Child abuse cases in both state and federal courts do present problems of proof, particularly when there is conflicting medical evidence, a course of conduct leading to death, or allegations that the death was caused by accident. None of the foregoing situations existed in this case. This was a murder. Murder presents problems of proof.

If the victim had been an adult, prior injuries, discovered in autopsy, with no link to the accused, would be inadmissible. The proof problems which led to the child abuse "exception" were not present in this case, yet the exception was allowed to swallow the rule.

The Ninth Circuit panel correctly perceived that the trial court permitted evidence and instructions which maximized the prejudice flowing from irrelevant evidence (Pet. A-71).

This evidence and its attendant instructions were so extremely unfair that their use violated those fundamental conceptions of justice which lie at the base of our institutions. United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048 (1977).

IV. CONCLUSION

The Ninth Circuit correctly determined that this evidence and the instruction to the jury for its use so infected the trial that McGuire was denied due process of law. Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 4, 1991

California Rules of Evidence

§1101. Character to Prove Conduct.

(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Federal Rule 404

Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible;e for the purpose of proving action in conformity therewith on a particular occasion, except:

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show actin in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Petitioner-Appellant, vs. WAYNE ESTELLE, Superintendent, California Men's Colony at San Luis Obispo, Respondent-Appellee.	)	No. 87-2522 D.C. No. C-85-6521 TEH

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Petitioner-Appellant, vs. WAYNE ESTELLE, Superintendent, California Men's Colony at San Luis Obispo, Respondent-Appellee.	)	No. 87-2522 D.C. No. C-85-6521 TEH

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

INTRODUCTION

In an opinion filed on May 8, 1989, a panel of this Court reversed the District Court's order denying a petition for writ of habeas corpus, and ordered the State of California to grant petitioner a new trial. This petition for rehearing and suggestion for rehearing en banc is filed within 14 days, as required by Federal Rules of Appellate Procedure [FRAP] 40.

Respondent believes that a rehearing is necessary in order to address material points of fact and law overlooked in the decision. Specifically, the panel relied upon an interpretation of the evidence on other injuries to the 6 month old murder victim which is both unsupported by the record and never argued by petitioner in this proceeding or in any state court. The panel only discusses a portion of the limiting

instruction relating to this evidence. Next, we note that the panel failed to discuss cited authority permitting the admission of other crimes evidence in child-killing cases, some of it from this Circuit. Finally, the panel opined that the prosecutor's grant of immunity to petitioner's wife was "questionable". That action was never objected to by petitioner in any proceeding; it was entirely inappropriate for the panel to consider it.

The panel also concluded that petitioner had adequately exhausted his state remedies, even though he had not presented certain of the issues raised to the California Supreme Court. A recent opinion of the United States Supreme Court, filed after this case was submitted but before it was decided, requires reconsideration of that holding and the precedent from this Circuit upon which it was based.

Respondent additionally suggests, pursuant to FRAP 35, that rehearing en banc is appropriate for two reasons. First, it is necessary to secure uniformity of decision within the Circuit. Other panels have recognized the admissibility of prior child abuse evidence in federal prosecutions; state court authorities and prosecutions should be evaluated similarly. Second, the question of when issues are viewed as exhausted by this Court is of critical importance to the State of California.

ARGUMENT

I.

FAILURE TO EARLIER PRESENT ISSUES RAISED IN HIS PETITION FOR HABEAS CORPUS TO THE CALIFORNIA SUPREME COURT IN HIS DISCRETIONARY PETITION FOR HEARING REQUIRES DISMISSAL OF THE PETITION FOR FAILURE TO EXHAUST STATE REMEDIES.

As did the District Court, the panel rejected respondent's argument that petitioner failed to exhaust state remedies with respect to two of the issues raised in his petition for writ of habeas corpus. It is conceded that petitioner raised all of his issues in the California Court of Appeal, but it is asserted that he presented only two of them in a petition for hearing to the California Supreme Court. The panel concluded, relying on *Maxwell v. Sumner*, 673 F.2d 1031 (9th Cir. 1982), that presentation of any issue in the hearing petition was sufficient to exhaust all issues under the state court's former rules of procedure. Slip opn. at 4832-4833. We submit that *Maxwell* should be reconsidered in light of the recent decision of the United States Supreme Court in *Castille v. Peoples*, ___ U.S. ___, 109 S.Ct. 1056 (1989).

In *Maxwell*, this Court concluded that it was unnecessary for a defendant to specifically raise an issue in a petition for hearing to the California Supreme Court so long as it was raised in the California Court of Appeal. Since a grant of review under the procedure applicable to petitioner's case, see slip opinion at 4833-4834, n. 1, vacated the lower court opinion, issues not raised in the petition were not waived for

purposes of later consideration by the Supreme Court. This Court recognized that the "purpose of a petition for a hearing in the California Supreme Court is to convince that court to exercise its *discretion* to hear the case." 673 F.2d at 1034, n. 1 (emphasis added).

The issue in *Castille, supra*, was the significance for federal exhaustion purposes of the denial of a petition for allocatur by the Pennsylvania Supreme Court. Under Pennsylvania law, such review is not a matter of right but depends on an exercise of sound judicial discretion. 109 S.Ct. at 1058. The Supreme Court concluded that denial of a request for discretionary review does not, in and of itself, constitute fair presentation of an issue to the state court for federal exhaustion purposes. 109 S.Ct. at 1060. This holding is particularly significant in petitioner's case.

The Supreme Court has required that, in order to be exhausted, an issue be "fairly presented" to the state court in the same manner that it is raised in the federal habeas corpus petition. *Castille, supra*, 109 S.Ct. at 1060; *Picard v. Connor*, 404 U.S. 270, 275 (1971). The same legal theory and underlying facts must be presented. *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3rd Cir. 1986). For example, a claim that the state trial court abused its discretion in applying a state rule of criminal procedure is "entirely different" from an argument challenging the constitutionality of that rule as applied in the circumstances of a particular case. State courts must be allowed

to consider the implications of a constitutional attack. *Boggs v. Evitts*, 818 F.2d 534, 536 (6th Cir. 1987).

In this case, petitioner not only failed to argue to the state courts that other crimes evidence issue raised a federal constitutional claim, he did not present two of the issues in the habeas corpus petition *at all* to the California Supreme Court. If, as *Castille* holds, denial of discretionary review does not constitute exhaustion, failure to even present the issue to such review must be viewed as inadequate. The fact that grant of hearing would ultimately have allowed all of the California Court of Appeal issues to be argued is irrelevant; it is impossible to know whether the California Supreme Court would have found the omitted issues provided more compelling reasons to grant review, even if those actually presented did not. Respondent submits that the *Maxwell* view (for exhaustion purposes) of prior California procedure cannot survive the holding in *Castille*.

The fact that the issue upon which this Court reversed the state court murder conviction was presented to the California Supreme Court is not significant, even assuming that the form of its presentation was adequate exhaustion. This Court has "read *Rose v. Lundy* [455 U.S. 509 (1982)] as requiring dismissal of the entire petition without reaching the merits of any of its claims where exhausted and unexhausted claims are combined. [Citations omitted]. The Supreme Court's direction to dismiss such 'mixed petitions' is clear and unequivocal, and leaves no discretion to

consider hypothetically the claims which had been exhausted." *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983). Because other claims remained unexhausted, the District Court (and thus, the panel) should have dismissed the entire petition.

Respondent urges this Court to grant rehearing in light of *Castille*. Given the significance of that decision and its impact on the circuit's view of California procedure, rehearing en banc is appropriate.

II.

THE PANEL'S HOLDING THAT IT WAS ERROR TO INTRODUCE EVIDENCE DEMONSTRATING PRIOR INCIDENTS OF CHILD ABUSE IGNORES THE FACTS IN THE CASE, RELIES UPON AN INCOMPLETE ANALYSIS OF THE LIMITING INSTRUCTION, AND OVERLOOKS FEDERAL AUTHORITY RECOGNIZING THE ADMISSIBILITY OF SUCH EVIDENCE.

The panel concluded that petitioner was prejudiced by the admission of evidence demonstrating prior acts of child abuse and by a jury instruction relating to that evidence. The decision is factually and legally inaccurate and should be reconsidered, for several reasons.

The panel referred more than once to evidence that Tori, the six-month old victim, had suffered "sexual abuse." Slip opinion at 4835. Respondent assumes this is a reference to evidence that she had sustained damage to her anus. There was *never* any suggestion, either by the prosecutor in argument or in any of the testimony presented by the state, that the injury was sexual in nature. Moreover, Daisy McGuire, defendant's wife and the child's mother, testified that she had pulled down on Tori's bowels a week or two before the child was killed because she was having trouble defecating. RT 406.[1] There is no basis in the record for concluding that the jury viewed this evidence as demonstrating sexual abuse of the child.

1. RT refers to the transcript of the state court proceedings, all of which were lodged by Respondent with the District Court.

The panel also asserted that the prior abuse evidence was only marginally relevant, because petitioner did not claim at trial that Tori's death was accidental. It expressly criticized the prosecutor's decision to introduce petitioner's statements to the police (in which he offered an accident defense), then impeach those assertions with the evidence of "Battered Child Syndrome." Slip opn. at 4835. The criticism ignores the fact that the prosecutor was obligated to prove death by a criminal agency; it suggests no federal constitutional prohibition against demonstrating the falsity of petitioner's statements to the police. California law specifically authorizes the prosecutor to introduce such evidence to show consciousness of guilt. *People v. McDowell*, 234 Cal.App.2d 54, 56-57 (1965). Federal courts have also recognized that it is appropriate to anticipate and counter defenses by use of other crimes evidence in the prosecutor's case-in-chief. *United States v. Lewis*, 759 F.2d 1316, 1349, n. 14 (8th Cir. 1985); *United States v. Evans*, 697 F.2d 240, 248, n. 8 (8th Cir. 1983). Petitioner should not be allowed to profit by his lies to the police, simply because he abandoned his first line of defense. The fact that he lied was relevant and probative evidence which the prosecutor was entitled to present to the jury.

The panel then found that the error in admitting the other crimes evidence was exacerbated by the trial court's limiting instruction. It concluded that, standing alone, the instruction would "probably" constitute error of constitutional

dimension. Slip opn. at 4837. This is not the test. Rather, it must be specifically shown that the instruction so infected the entire trial that the conviction violated due process. *Cupp v. Naughton*, 414 U.S. 141, 147 (1973); *Quigg v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980).

More disquietingly, the panel quoted only a portion of the instruction. The jury was specifically advised that other crimes evidence was not intended to show bad character or criminal disposition,[2] a limitation which this Court found to be significant in *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). *Butcher* was one of the cases cited in the panel opinion. Slip opn. at 4837. As this Court recognized in *United States v. Winters*, 729 F.2d 602, 604 (9th Cir. 1984) (the other case cited in the panel opinion), it must be assumed that the jury followed the limiting instructions. *See also, Parker* v. *Randolph*, 442 U.S. 62, 73 (1979).

To the extent that the instruction would permit an inference of guilt based on the prior incidents of child abuse, such an inference is expressly permitted by the federal courts in infanticide or child abuse cases. *See, e.g., United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973); *United States v.*

---

2. The panel excised the following admonition in its discussion of the instruction: "Such evidence if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes." CT 756-757. It is fundamental that the jury instructions must be considered as a whole. *Francis* v. *Franklin*, 471 U.S. 307, 315 (1981).

Harris, 661 F.2d 138, 142 (10th Cir. 1981); *United States v. Leight*, 818 F.2d 1297, 1304 (7th Cir. 1987). This Court has followed *Woods* in a federal prosecution. *United States v. Lewis*, 837 F.2d 415, 419 (9th Cir. 1988) (evidence of prior child abuse was admissible because of its "probative value in disproving claims that the defendant lacked intent or that the child died by accident"). The state prosecutor in this case had precisely the same interest. The panel's failure to consider any of the federal authority cited to it by respondent compels reconsideration. The blunt fact is that neither admission of the evidence, nor giving of the instruction, nor both, denied petitioner due process.

III.

THE PANEL'S OPPOSITION TO THE STATE'S DECISION TO GRANT IMMUNITY TO PETITIONER'S WIFE IS AN IMPROPER BASIS UPON WHICH TO GRANT THE PETITION.

In its conclusion, the panel expressed an undisguised distaste over the prosecutor's decision to grant Daisy McGuire immunity from prosecution, and even suggested that the state re-examine that decision and possibly withdraw the immunity. Slip opn. at 4837. Those observations were entirely inappropriate.

First, there was never any objection, in any court, by petitioner to the grant of immunity. Indeed, under California law, he had no standing to object. *People v. Randolph*, 4 Cal.App.3d 655, 660 (1970). The same rule obtains in federal prosecutions. *United States v. Ellis*, 595 F.2d 159, 163 (3rd Cir. 1979.)

Second, federal courts have "no supervisory authority" over state judicial proceedings. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Even in a federal prosecution, the decision to grant or deny immunity belongs exclusively to the executive branch. *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984); *Snelling v. United States*, 719 F.2d 1067, 1068, n. 3 (10th Cir. 1983).

Finally, the Court's implied criticism, that the prosecutor may have let the guilty party go free, ignores a substantial amount of contrary evidence: (1) the testimony of a woman in the hospital waiting room who heard Mrs. McGuire ask petitioner what had "really happened" to Tori while she was in

his exclusive custody, RT 174-179; (2) Mrs. McGuire's complaints to neighbors and friends about the way petitioner treated Tori, RT 470, 496, 498; (3) the testimony of a neighbor who saw petitioner pinch Tori's face while forcing food into her mouth, RT 469-470; and (4) Mrs. McGuire's attempt to exonerate petitioner from the stand, despite inconsistencies with her prior statements and the grant of immunity. RT 342, 348. In short, there was substantial evidence of petitioner's guilt, and the jury was fully aware of his wife's status in the case and her efforts to assist him. Because the panel impermissibly relied upon the immunity grant as a basis for reversing the conviction, this Court should grant a rehearing.

CONCLUSION

For the reasons stated above, respondent respectfully submits that a rehearing or rehearing en banc should be granted.

Dated: May 19, 1989

JOHN K. VAN DE KAMP, Attorney General
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PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am over the age of eighteen years and not a party to the within entitled action; I am employed within the City and County of San Francisco where this mailing occurs; my business address is One Bush Street, Suite 200, San Francisco, California 94104.

On February 4, 1991, I served the foregoing document described as:

RESPONDENT'S BRIEF IN OPPOSITION and
RESPONDENT'S MOTION TO FILE OPPOSITION BRIEF
IN FORMA PAUPERIS

on the interested party(ies) in this action by causing a true copy thereof to be placed in a sealed envelope addressed as follows:

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Mae F. Dyson

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Supreme Court of the United States

No. 90-1074

Wayne Estelle, Warden,

Petitioner

v.

Mark Owen McGuire

ORDER ALLOWING CERTIORARI. Filed February 25, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

February 25, 1991

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APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 90-1074

WAYNE ESTELLE, WARDEN (Petitioner) vs. MARK OWEN McGUIRE (Respondent)

The Clerk will enter my appearance as Counsel of Record for MARK OWEN McGUIRE

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature [signature]

(Type or print) Name ANN HARDGROVE VORIS

☐ Mr. ☒ Ms. ☐ Mrs. ☐ Miss

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Rule 5

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

90-1074

CERTIFICATE OF SERVICE BY MAIL

WAYNE ESTELLE, WARDEN, Petitioner, v. MARK OWEN McGUIRE, Respondent.	)	No.

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DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That my business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on December 14, 1990, I serve true copies of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter on counsel for respondent by placing same in envelope addressed as follows:

Ann Hardgrove Voris
Morris, Taylor, Hays & Higaki
One Bush Street, Suite 200
San Francisco, California 94104

Said envelope was then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

DANE R. GILLETTE
Deputy Attorney General

Supreme Court, U.S.
FILED
APR 10 1991
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No. 90-1074

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN, Petitioner,

v.

MARK OWEN McGUIRE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Certiorari Granted February 25, 1991

JOINT APPENDICES

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RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRIES
May 12, 1982	Respondent sentenced to fifteen years to life in state prison for second degree murder
January 15, 1985	California Court of Appeal affirmes the judgment of conviction
March 21, 1985	California Supreme Court denies petition for hearing
July 15, 1987	United States District Court denies petition for writ of habeas corpus
May 8, 1989	United States Court of Appeals reverses the judgment of the District Court
April 23, 1990	United States Court of Appeals withdraws and vacates its first opinion
May 4, 1990	United States Court of Appeals reverses the judgment of the District Court

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRIES
November 23, 1990	United States Court of Appeals denies rehearing and rejects the suggestion for rehearing en banc

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

vs.

MARK OWEN MC GUIRE,

Appellant.

H-3748

--o0o--

REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF ALAMEDA
HONORABLE BENJAMIN TRAVIS
[March 8, 1982]

--o0o--

[53] THE COURT: Counsel, are you going to have the doctor testify to anything other than the force used to cause these injuries?

MR. PLATT [Prosecutor]: I am going to ask the doctor to testify to the nature, extent in fact of several

trauma that was found on the dead child, and I also am going to ask the doctor whether or not he can identify the child as a battered child.

THE COURT: Okay. Is there any additional aspect of that you have an objection to?

MRS. SIMPSON [Defense counsel]: I would object, again, to any use of risk, so-called risk factors in his testimony. I don't whether that includes them or not.

MR. PLATT: I am not going to be duplicative. If I can prove risk factors through Dr. Levine, I am not going into that with this doctor.

[54] THE COURT: So, we wouldn't have testimony of that in this doctor?

MR. PLATT: That is correct.

THE COURT: We don't need to waste his time.

MRS. SIMPSON: I don't know if he is going to ask Dr. Hermann about the broken ribs.

MR. PLATT: Absolutely.

MRS. SIMPSON: It is my understanding that his conclusions about the nature of the injuries and whether or not they, the child was battered, did not include, did not, were not based upon any information about broken ribs or about previous bruises other than the one on the flank. That he did not have that information available when he --

THE COURT: He still has a right to testify that that lady had that bruise. What is your objection to that?

He is going to testify that he looked at X-rays and determined that that lady had those bruises.

Is that correct?

MRS. SIMPSON: No.

MR. PLATT: The X-rays, he saw the bruises. What I am trying to avoid here and where I think we are headed, if he is not permitted to testify about the significance of prior injuries, then we would have argument by defense counsel saying there is no evidence of any prior injuries.

THE COURT: I have no problem with that. I want to know if he is going to look at the X-rays and --

MR. PLATT: He has already looked at the X-rays.

THE COURT: What is your objection to that?

[55] MRS. SIMPSON: Because at the time he formed his opinion about the cause of the injuries, about whether or not the child was a battered child, he didn't have that information. So his opinion was based upon other information and that information was not part of the information that he used.

THE COURT: Now, can we determine, Doctor, in reviewing those X-rays and telling us what you see in the X-rays, are you relying upon any social information that was given to you?

THE WITNESS [Dr. Hermann]: No.

THE COURT: Okay. Your objection is overruled. The testimony is going to come in.

MR. PLATT: There is one social comment, I think the doctor did have at his disposal because Detective Gillis was present at the time of the autopsy and that was the inconsistent history of taking a fall from a 16-inch high couch to a walker that is on the floor.

THE COURT: I have no problem with that.

MR. PLATT: That is a form of social history, that doesn't go to his risk factors.

THE COURT: I have no problem with that.

MRS. SIMPSON: Your Honor, I would object again on the same basis as to any testimony that indicated to him that there was a battered child.

THE COURT: His testimony is --

MRS. SIMPSON: Under Joseph.

THE COURT: His testimony was that that, that this, this injury was inconsistent with that description of how it occurred.

MRS. SIMPSON: Okay. If that is as far as it goes.

[56] MR. PLATT: And this child is a battered child.

MRS. SIMPSON: If he is going to take that additional step, saying that in his expert opinion that means that that child is a battered child, then I would object and I would object on the same grounds that I objected to before and cite Joseph.

THE COURT: Wait a second. What is the doctor's basis for concluding that this is a battered child?

MR. PLATT: That the child has seven old broken ribs, has a multiple blood trauma to the stomach, has a

bisected liver, a pulverized pancreas, a bruised lung.

THE COURT: He would be permitted to testify to all of that?

MR. PLATT: Yeah, and then he is then provided a history that the child took a 16-inch fall and it is inconsistent with that.

This is, I think I indicated the incident of the battered child syndrome --

MRS. SIMPSON: That is what I objected to. This last thing.

THE COURT: Okay. We don't need the doctor any further. Why don't we resolve that among ourselves. Well, we will excuse the doctor at this time.

MR. PLATT: Pardon me, one more thing.

Is battered child syndrome a recognized medical diagnosis?

THE WITNESS: Yes.

. . . .

[60] THE COURT: Okay. With regard to the doctor, the testimony of Dr. Hermann, we have no problem. That will be admitted. The only problem I have is the portion of the testimony of the pediatrician.

MR. PLATT: Dr. Levine.

THE COURT: Yes. Dealing with the kind of testimony that [61] has just been recently held inadmissible in People v. Joseph.

MR. PLATT: I don't know what to say. Joseph is the only case that goes to that direction in the State of California.

THE COURT: It is higher that I am and then I am bound to follow it.

MR. PLATT: Then you have to ignore Wright and Schockly and Steegler and Izeros and two of those if not three are Supreme Court cases.

THE COURT: Where in Wright says that that type of information is appropriate?

MR. PLATT: I think it is used --

THE COURT: I went through the three cases you gave me and I couldn't find anything in there. Only one of them, one of the 72 dealt with that and it didn't

deal with -- in Ewing it didn't deal with this kind of testimony.

MR. PLATT: That is true enough. But, one of these cases and I have been searching while you have been reading deals with the testimony involving the profiles of the battering parent, abusing family. I think it is probably in Landeros vs. Flood which does in its footnote acknowledge the expanding field of medical literature involving the risk factors that are used by the courts, pardon me, by doctors in identifying who is at risk as a battered child.

MRS. SIMPSON: Your Honor, I would point out in that case it was not a criminal case. It was a case, I believe, where a doctor was being sued for negligence.

For failing to report a suspicious case and the standards in that kind of case might we be different from the standards in a criminal case. There [62] the doctor, as I understand Ewing stated in her testimony this morning, is supposed to look at a minimal evidence of abuse, not even battered child syndrome. If they find that, further investigation is supposed to take place, so that I think is a different situation and distinguishable case.

THE COURT: Let me ask you for an offer of proof. What is it she is going to testify to with regard to this?

MR. PLATT: Risk factors?

THE COURT: Yes.

MR. PLATT: I intend to run every significant and available evidentiary fact of the social setting or milieu to use the language of Landeros vs. Flood in which this murder takes place and ask whether or not those factors placed this child at risk in the context of the battered child syndrome.

THE COURT: That is the very thing that was dealt with in Joseph, is that correct?

MR. PLATT: Precisely. I will bring this thing to a head real quick.

THE COURT: Let me do this. Until you can show me some other case by the Supreme Court authorizing that sort of testimony, I would have to follow Joseph.

MR. PLATT: I would have to follow Landeros vs. Flood.

THE COURT: But that is not a criminal case.

MR. PLATT: But it cites and includes the body of law of our criminal cases and imposes standards by that which is meant the truth in civil cases is different from a criminal case. I don't know how --

MRS. SIMPSON: Your Honor, I believe it cites Jackson. I [63] may be wrong, but I believe it cites Jackson for the definition of the battered child syndrome and that is a restricted definition.

THE COURT: Joseph came after Landeros, is that correct?

MR. PLATT: And Landeros is a Supreme Court case.

THE COURT: And Landeros was on the books when they decided Joseph.

MR. PLATT: Landeros was not considered. Nowhere in the Joseph opinion is that opinion cited. Nowhere in the Joseph opinion is any case other than Jackson, the 1971 case cited, and then Jackson is not even followed by the Joseph decision. It is paid lip service, merely, and it goes off on Jackson standing for the proposition if a physician can render a decision which bears upon the ultimate facts that goes to the jury, in no case does it talk about admissability of expert opinion testimony, indicator, reason for opinion involving the battered child syndrome. You know, I am stuck with Joseph as the standard, but it is the only case way out on the subject in the State of California. That is why we have seen fit to seek a review and repeal of that decision.

THE COURT: I can't repeal it.

MR. PLATT: I know you can't, but nowhere does it say you have to follow it because you have appeal authority or other directions by the Supreme Court.

MRS. SIMPSON: Your Honor, I don't think there is any authority in other divisions by the Supreme Court in allowing those risk factors in.

MR. PLATT: In other words, the doctors can testify, but [64] they can't give us the reasons.

THE COURT: Dr. McNie can testify as to the battered child. We are just talking about whether or not this can be done by the pediatrician.

MR. PLATT: Any expert qualifies, anybody who has training, experience, education, et cetera, takes them out of the realm of the layman, qualifies for it. Landeros vs. Flood says the battered child standard, the standard of care imposed by medical practice, particularly in the subject of medical testimony, and another factor is another factor that Joseph fails to address, I mean --

THE COURT: I think the --

MR. PLATT: One of the things that Dr. Kempie went off on is the battering parent himself, a battered child. And for years that is thought of one of the many indicators. That has been gone on abroad. The fact of the matter is this Defendant himself is a battered child and yet I would be barred from introducing that into evidence. If I could get his brother up here --

THE COURT: The fact that the victim is a battered child, is a fact being testified to by Dr. Hermann.

MR. PLATT: Okay. But what you are limiting me to is the opinion, you are allowing me to affix a label without the underlying reasons why this label applies. You are opening it up for the defense to mislead this jury under the guise of keeping outside risk factors and that is the danger I apprehend and that is what I seek to address now.

THE COURT: Well, the problem I have with the risk factor [65] is that Joseph says it shouldn't come in. The fact that you have a battered child here is something that is coming in because Dr. Hermann is going to testify to that.

MR. PLATT: The Joseph opinion, when you read it, says that Judith Poem was testifying off the wall about matters which had no evidentiary bearing to the case. The fact of the matter is, and the record on appeal in both courts shows that there was, that that was the uncontradicted state of the evidence that that factor did apply to that case. Why the Court chose to ignore it, I have no way of knowing.

MRS. SIMPSON: Your Honor, I don't think that is what Joseph said. I don't think Joseph said those risk factors weren't present in that particular case. I think it is arguing even if they were present, it was inadmissible. I think again the analogy it makes is with bringing in testimony of a burglary, about whether the person was

poor, which they may well be. Whether the person came from a broken home, which they might well be. Whether they had at that time, all kinds of other things. Even if they were all through and there was evidence of those things, they would not be admissable from an expert sociologist's testimony that those things were correlated.

MR. PLATT: Well --

MRS. SIMPSON: With burglaries.

MR. PLATT: I would merely observe that since 1962 and Dr. Kempie published his article and a few years before with Kathy and Sinagol and some other medical writers, the matter, the subject, the concept, medical fact of anomaly of the battered child has come a long way baby to paraphrase the television [66] commercial. What this says by paraphrasing of Defense Counsel seems to be that this jury in trying a battered baby murder is to be denied access to the facts that bear upon the expert's opinion as to whether or not this baby is in fact a battered baby. We are to ignore the last two and a half decades of medical advances in the field, in the name of a case that does not, frankly, that stands out on its own. I would urge the Court to ignore it. Because I cannot predict what the Supreme Court will do, but we are currently, certainly urging them to reverse this decision, which seems to put medical sciences back in the ages of witchcraft and deny this jury the ability to hear competent evidence on the subject that is peculiarly compelling in this type of a case.

MRS. SIMPSON: Your Honor, as Counsel pointed out himself, some of the hallmarks mentioned by Kempie are no longer considered valid. I think that there are a number of other factors that are matters of dispute, not a matter of an exact science in this matter. It is unusual to allow this kind of material in. It seems it is the very kind of situation that we have to be very careful about.

THE COURT: Okay. Dealing with the testimony, the sociological testimony, the case holds, she also testified to certain risk factors which may have existed in this case and are correlated with child abuse, stress in the home.

MR. PLATT: Which may have, I believe you said.

THE COURT: Yes, stress in the home. Premature births, early medical problems, absence of a parent, slowness to toilet training, parent's perception that the child is different.

[67] At this time it is compatible to a sociologist testifying that a defendant was probably guilty of burglary because he was a member of a minority group, grew up in a poor neighborhood, dropped out of school, was unemployed, and a relative with a criminal record, et cetera. The fact that this is testified to by the social worker may be correlated with the occurrence of the battered child syndrome, but the testimony was misleading because it gave no indication of the frequency with which the factors exist, but the syndrome does not occur. It had no tendency in reason to show that this case was one in which the factors existed and the syndrome occurred.

MR. PLATT: I can't argue with the fact that that language occurs there. However, I can argue with the facts of the Court's analysis and the record on appeal, which is why we are taking it off.

Dr. McNie at that trial, which I prosecuted personally, testified to incidents which certain factors occur in his study at that time.

Dead babies, battered dead babies in Alameda County over the preceding 16 to 18 years. Each and every risk factor testified to by Judith Cohn was uncontradicted that the child of that case was put into evidence by other witnesses. Why the Court missed the evidence, is beyond me. But they did. They misread Dr. McNie's testimony, and I don't know what to say. I guess it is horse on the baby and down the toilet with the battered child syndrome testimony by two and a half decades by the medical profession.

MRS. SIMPSON: Your Honor, the fact that Dr. McNie testified [68] about his findings with dead battered children does not answer the question raised by the Court in Joseph.

The Court's concern in Joseph was that there is not information on how frequently those risk factors occur in the population at large. Not how frequently they occur among battered babies. It serves like the argument that was made by a doctor in England when homogenized was shown to cause birth defect. He said well, that's like I gave them out so frequently, if that were true, every baby

should have it or it is, in fact, he was wrong in that case. But, or, you could say that every baby who got those later defects drank milk first. You can't argue from the existence in a non-population of some characteristics that there is a call for relationship. You have to know something about the frequency with which that occurred in the population at large. You have to have some more controlled studies. I think that is what he is objecting to there. That you are taking characteristics among a population of battered children without the appropriate information about how frequently those characteristics occur in the population at large. That is what Joseph says.

THE COURT: Yes, if we are dealing with the unreliability then I am controlled by it. He is saying that that, this is not elevated to a degree of scientific evidence that without these other tests having been made, that they can recognize.

MR. PLATT: I agree with your evaluation of what Joseph said.

THE COURT: Uh-huh.

MR. PLATT: My problem is that we hold, the medical [69] profession, health care professionals, teachers, social workers including Judith Cohn, accountable if they fail to diagnose and recognize and treat and report the very thing that they can't prove before this jury. I am among the horns of a dilemma and Mr. Justice White has refused in this opinion and informally to clarify that point.

THE COURT: Isn't the thing that is missing here some showing a of a controlled group that show that when we have these certain tendencies, that certain percentages of them turn out to be child abusers and a certain percentage turn out to be not a child abuser?

MR. PLATT: I believe you would find authorities in the Flood, footnotes that talk about the volumes of material in studying the battered child.

THE COURT: We are only dealing with one aspect of it and that is dealing with the risk factors.

MR. PLATT: Okay. Certain things attend a child being at risk. One of these is premature death. I'm sure Dr. Levine, when she talks about the standard, heh, show me a pre-me and I will show you the things that is different, who will not have the budding things with dad, who will be a problem child because of the attended medical burden of that child's first two weeks of life. That is one of the risk factors.

Another thing is strung out on dope. Is he strung out because he got canned, is he strung out for other reasons. Is mom strung out because dad is any of these things. Is she herself subject to some stress that is extraordinary, which stress defines as violent expressions in the body of this small [70] child. That is what we are talking about. We are talking about the social phenomenon that attends the battery of that child. These are provided --

MRS. SIMPSON: I think, Your Honor, you also find literature that shows that between about 24, 25 percent of the population with children have problems at work. Large percentages reports some marital problems. There aren't that many people battering their children. So that you pick out their characteristics, you find a few of them and you cannot conclude from that that this person caused, was, this caused the battering of the child.

MR. PLATT: We do not maintain that the battered child syndrome addresses itself to the identity of the perpetrator. We maintain as a diagnostic devise period. I am not looking to identify anybody through risk factor testimony.

MRS. SIMPSON: Your Honor, I think that Counsel recognizes that although that is technically true, that may not be the way that the jury uses the information, and that is another reason why you have to be particular careful in admitting this kind of evidence. If you say that, admit evidence that somebody has stress, lost his job, surely you are pointing to and you are saying that is relevant. Surely you are pointing to him or you can suspect the jury to draw that conclusion even though they might be otherwise instructed.

As I pointed out before, we are generally in the law very careful about bringing in evidence of prior acts without good evidence to tie a particular defendant to those prior acts. [71] For example, under 101 B, 1101 B you can't generally bring in prior acts or prior offenses

unless there is a preponderance of the evidence showing that the person did in fact commit the act. This is an exception, and it is a narrow exception and as you have, His Honor has pointed out, none of the cases, none of the criminal cases cited as to the child, battered child syndrome has this kind of evidence been admitted. The evidence is all physical injuries.

THE COURT: Okay. I feel bound by Joseph and therefore that testimony as to the risk factors I will exclude.

MR. PLATT: Okay.

THE COURT: Okay. Are we ready for the jury?

MRS. SIMPSON: Your Honor, I have one other thing I would like to mention before the jury is brought down. That is I would also oppose the admission of the earlier injuries, the admission of evidence of earlier injuries in this case. On the grounds that there is not sufficient evidence to constitute the battered child syndrome in this case. Again, the same cases that, I think that Your Honor has read on the issue of the risk factors is Wright, Flood and Landeros vs. Flood, People vs. Jackson, Ewing, in all of those cases the children involved have extensive histories of prior injuries and in those cases those injuries were much more closely tied to the defendant than they are in this case.

In this case there is evidence of healing broken ribs. There is evidence of some bruises. That does not begin to constitute the battered child syndrome under Davis,

sorry, under Jackson where there are a number of elements listed as constituting [72] the or as criteria for the battered child syndrome. In that situation I would argue that the evidence of the prior injuries should not come in. That it is contrary to the requirements, foundational requirements that any prior acts be established by the preponderance of the evidence. It is contrary to the section 1101 B of the Evidence Code that requires, that says that no character evidence can come in. It tends to be treated as character evidence by the jury. It also has the, it has a kind of bootstrap kind of argument. These injuries are not tied to my defendant, but you are going to ask the jury to say, well, because it, they occurred in the past, that that makes it more likely that he committed the injuries on July 7th, 1981 and that because the injuries on July 7th, 1981 were proceeded by the other injuries, then it is more likely that he committed, committed all of the injuries.

So, he is using them to get to the result where you want, where they shouldn't come in.

Also, I would object to the, it coming in under Section 352 of the Evidence Code as being not sufficiently probative and also being prejudicial.

THE COURT: You.

MR. PLATT: Now?

THE COURT: Yes.

MR. PLATT: First of all, and here is the evil in Joseph, and I'm sorry to linger on the subject. I can't

prove this child is a battered child through risk factors because I can't because of Joseph. Now, she says I don't want him to prove any of the physical facts that this child is a battered child [73] because this child, it is unduly prejudicial. This is a picture of an anus I have to recover from that, because at noontime I am informed that is an intentional trauma site. So I have a lacerated anus. I have a busted lung. I have eight, seven broken ribs, old injuries. I have the lung being a new injury. The anus being an old injury. I have a pulverized pancreas, a bisected liver and various trauma and one dead child. That is classically within the battered child syndrome.

True, Jackson addresses itself to so-called elements or components to the battered child syndrome. All in 1971, Your Honor, did the world stop and the Jackson case and the battered child death cases get cast in cement and stone in 1971. When incidentally, is the time frame when the Landeros vs. Flood medical malpractice suit arose, and it was the Jackson state of medical diagnostic ability of battered children that was addressed in Landeros in those terms noting the 1971 date.

So, I will submit it.

THE COURT: I have already ruled they are coming in. She is making a comment for the record.

MR. PLATT: I am sorry. I didn't know that. We have been over so much ground here I keep losing more evidence.

THE COURT: No. That testimony is admissable. The doctor is using it in the diagnosis. It is the battered child syndrome. I am going to admit it.

MRS. SIMPSON: Can I ask for one more clarification and that is whether Dr. Hermann could comment on the inconsistent acts of the injuries as being part of the battered child syndrome?

THE COURT: Well, his basic testimony is that that injury [74] could not have occurred in that manner.

MRS. SIMPSON: Right. My question is whether he can testify.

THE COURT: He can go then and in it further and say sure.

MRS. SIMPSON: That is indicative.

THE COURT: He can employ that that is part of the child syndrome.

MRS. SIMPSON: I wanted the record to reflect my objection to that.

THE COURT: You object and I have ruled on the objection. We may proceed.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	
Respondent,	H-3748
vs.	
MARK OWEN MC GUIRE,	
Appellant.	

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REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF ALAMEDA
HONORABLE BENJAMIN TRAVIS
[March 15, 1982]

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[567] THE COURT: . . . .

The next one was 2.50. 2.50.

MR. PLATT: That is the evaluation of evidence of other offenses.

MS. SIMPSON: Your Honor, my objection to that is that we, we specifically, that evidence was not introduced for the purpose of showing that the Defendant had committed other crimes, and I think it is misleading to say that. It was introduced to establish the battered child syndrome as I understood it, and was limited to that purpose.

MR. PLATT: It shows that the Defendant may have committed other crimes.

THE COURT: But, she is saying such evidence was [568] received and may be considered by you only for the limited purpose of determining if it tends to show.

Now, one thing that it was admitted for, was for impeachment?

MR. PLATT: Sure.

THE COURT: Because she had said the other crime was his inflicting injury on Mrs. McGuire and she had said she had been struck and you brought in the fact that she had been struck.

MR. PLATT: That's right.

THE COURT: So that was for impeachment purposes.

MS. SIMPSON: But, this instruction doesn't have anything to do about impeachment or --

THE COURT: That was the reason it was introduced.

MS. SIMPSON: Right, right.

THE COURT: So, I have to tell them that.

MS. SIMPSON: But, this is not an appropriate vehicle for that.

MR. PLATT: The other area are the seven broken ribs and the stoic lacerations of the anus and the bruises that Mrs. Short saw on the child on the date of May 25th, after the Defendant had twisted her face around.

MS. SIMPSON: Well, the ribs, I think are not an example. Perhaps the bruises are. Let's see.

I, now that you mention the bruises, I think this could come in for bruises, but not for the other things. But, I will withdraw my objection.

THE COURT: The question is which one of these [569] sections below are we going to bring it in for. What is the language that is going to be used?

MS. SIMPSON: That's right. That is the other problem. It has to come in for one of these purposes. I withdraw my withdrawal. It has to come in to those other purposes.

MR. PLATT: It goes to intent and identity.

MS. SIMPSON: It doesn't go to identity. All of the cases show --

MR. PLATT: It was not admitted for that purpose. First of all, the one relating to the striking of Mrs. McGuire was used, was permitted for impeachment purposes, only.

MR. PLATT: Okay.

Now, where the one where the kid's head gets twisted around and she comes up with the bruises on the face and

she is carried off around the corner by the Defendant holding her by one arm, at that time a five month old baby, is evidence of another crime. A 27035, one of abusing a child. It tends to show that he is the person as between the two who does this sort of thing, who abuses that child.

You have the five lacerations, oh, pardon me, seven broken ribs. You have the stoic lacerations to the anus, which Mrs. McGuire says shortly before the killing she extracted a stool from that area, which is, you know, of course the doctors had something to say about that. Then, you have the Defendant acting up around the baby.

THE COURT: So, you are saying it is for the first [570] one?

MR. PLATT: I am saying it is for identity and for intent, both.

MS. SIMPSON: Your Honor, the requirement for identity is clear. It has to be a very similar thing that you would be able to look at that particular offense and say by looking at that particular offense you can tell it is the same mode of action and it is something about the very way of doing that that says it must be that person and no one else. We are talking about hitting someone in the stomach, hard. That is not anything that you could say well, that shows it is the same person and pick somebody up by the arm or who said fed the baby roughly or who broke the ribs. None of those things.

MR. PLATT: None of the cases from Wiesberg, which is the first battered child syndrome case in 1968 forward, talk about having to, having to execute the intentional trauma with surgical precision, so that only broken ribs relates to broken ribs or only visceral trauma relate to visceral trauma. In fact, when you read Ishman, when you read Steiger for example, when you read Landeros vs. Flood, that child was burned as well as battered. Right on down the line. They talk about violence on this child that is not explained away by the inconsistent history, medical history provided by the caretaker.

MS. SIMPSON: But, those things are going to the issue of whether or not the child was battered or not. That is what that material, the testimony about the anus and [571] the ribs, that is what that material came in for. Does this child fit into the battered child syndrome. This instruction relates to similars, and there is a whole body of case law on similars. This doesn't relate to the battered child syndrome. It relates to similars.

MR. PLATT: It relates to both.

MS. SIMPSON: The only reason that that material came is was to say did that child die accidentally or not. It wasn't coming in to establish the identity of the perpetrator.

MR. PLATT: Pardon me, Your Honor. You could prove that the child was a battered child by proving a succession of injuries to that child, which are not

consistent with the history provided by the caretaker at the time of the injuries being suffered.

THE COURT: Uh-huh.

MR. PLATT: That caretaker raises the child, was a battered child, be that child a survivor or otherwise. You then have a situation in which a modality of violence is employed against the child, and if you establish later down the line, initially in our situation, we don't know who done it. Did mom do it, did dad do it. Or, this is a chance encounter with a stranger. Down the line, when you identify the agent of death as per Wright, which is at 60 Cal.App.3d at Page 6, once you identify the Defendant as the agent of death, then you may use these prior incidences of trauma to the child in that context. You have identified him as the killer.

[572] THE COURT: But, this is a different thing. I agree with her. If it is, the two purposes of the other incidents were permitted to come in for, was one for impeachment purposes and two, to establish the battered child syndrome.

MR. PLATT: Well, you also have Mr. McGuire, the Defendant, abusing the child in front of Mrs. Short.

Am I given to understand that I cannot aruge to this jury that he is self-identified by prior conduct as the perpetrator of the present conduct in connection with his rather, well, the nature of the self-serving declarations which I maintain represent, inclined ---

THE COURT: I am not precluding you from arguing that. I am saying when it was admitted, it was admitted for that purpose.

MR. PLATT: I think we are up to error. As long as the jury is regarded not to consider it as bad character testimony, the person who is trying to do evil deeds.

THE COURT: Okay.

MR. PLATT: Okay. So, what are we going to do with 2.50? There is going to be some modification.

THE COURT: This is what I am going to read to the jury.

Evidence has been introduced for the purpose of showing the Defendant committed a crime other than that for which he is on trial. Such evidence, which believed and is in evidence, may not be considered to prove that he is a person of bad character or that he has a disposition to [573] commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show impeachment of prior testimony or to establish the battered child syndrome.

MR. PLATT: Now, does that leave me out on the limb when I argue that since he is the guy who put the facial bruises on the child on May 25th, that he is the guy that did the killing?

THE COURT: No. You are just talking about circumstantial evidence.

MR. PLATT: Okay.

THE COURT: That is what you are talking about. Here is some evidence. Here you can infer that if he did it that time, you can infer that he did it that time.

MR. PLATT: She is probably going to say that I am trying to lie to the jury, and that puts me in an --

MS. SIMPSON: Your Honor, if it comes in for those two purposes, then he can't argue other purposes.

THE COURT: Yes. Wait a second.

Which is the testimony your are relying upon?

MR. PLATT: Okay. Specifically I am looking at the seven broken ribs. I am looking at the stoic lacerations of the anus and I am looking at the infliction of the bruises and the arm jerking number to which Mrs. Short testified, which all of that serves multiple purposes. One of which is to establish the child as a battered child. Secondly, it tends to identify the defendant, particularly this business with the face and the arm. The Defendant as the [574] perpetrator. Thirdly, it tends to impeach Mrs. McGuire, who says that oh, the Defendant was the milk of human kindness around this small child.

THE COURT: Okay. There is some evidence that came in for impeachment purposes only and some to deal with the battered child. Now, the other piece of evidence that you are referring to what you want to argue, there was an objection to that?

MR. PLATT: I don't recall what the transaction was, then. We had objections to every question.

THE COURT: Wait a second. What we will do is after we are finished with the rest of the instructions, we will have the Reporter go through the record to find out what it was admitted for.

MR. PLATT: Okay. Now we have another problem, there.

MS. SIMPSON: May I say --

MR. PLATT: Because once we have impeached Mrs. McGuire, it comes in for the truth of the matter stated and the truth of the matter stated is that he battered the child in front of Mrs. McGuire and Mrs. Short, and, therefore, it applies to the identity in intent issues, which are the course of the case, here.

MS. SIMPSON: Wait. First of all, we discussed in chambers and probably on the record that all, just grouping all prior injuries, I certainly understood that to come in for those limited purposes. I certainly understood that to include bruises as well as broken ribs and the problem [575] with the anus. You ruled that all prior injuries to the child could come in for those purposes. So, the fact that I didn't object when he asked something about the bruises should not allow him to get that in for some other purpose. They came in for those two limited purposes.

MR. PLATT: If it is admissible, it is admissible.

MS. SIMPSON: Well, for a limited purpose.

THE COURT: We are saying the two limited purposes were for impeachment and to establish the battered child syndrome.

MS. SIMPSON: That's right.

MR. PLATT: Well, we have to dip into the record, then, because I don't think it is subject to that kind of qualification.

THE COURT: Okay.

MR. PLATT: Because it certainly comes in for the truth of the matter in the prior inconsistent statement. It is proven through the mouth of an eyeball witness.

MS. SIMPSON: What is the prior inconsistent statement?

MR. PLATT: Mrs. McGuire says it never happened. Mrs. Short says it did. That comes in for the truth.

MS. SIMPSON: Mrs. McGuire wasn't present during the arming one, right? The only one would be the holding of the chin. That you could --

MR. PLATT: I believe she was.

MS. SIMPSON: No. That was not Mrs. Short's testimony.

[576] THE COURT: I am trying to find out how the lady has seen him grab the baby --

MS. SIMPSON: Hold the baby by the chin while he was feeding here, I believe was the testimony. She doesn't see whether the bruises --

THE COURT: And the other one saw him hold the baby by one arm.

MS. SIMPSON: Then she later saw him coming out of the door, holding him by one arm.

MR. PLATT: The him was a her.

THE COURT: I'm sorry.

MS. SIMPSON: Yeah, right.

THE COURT: What is that limited if that is the observation of the lady?

MS. SIMPSON: Because when we talked about what prior, what the prior injuries to the baby were coming in for, we limited all of those prior injuries.

THE COURT: Then, we are talking about going back and finding something on the record.

MR. PLATT: Then we have an additional problem. If that is the case, then what are we going to do with all of the witnesses coming in through hearsay, oh, I never saw the Defendant beat up the kid. She is certainly going to argue that, and I am precluded from arguing the contrary of that proposition.

MS. SIMPSON: I am just rebutting what you brought in that this was a battered child. That's all. That is what I had those witnesses there for. That same limited purpose [577] to say that this child was not a battered child.

THE COURT: Okay. When we are through, we will go back and find where that limitation was in the record and then I can deal with it from there.

. . . .

[March 16, 1982]

[645] MRS. SIMPSON: We left 2.50 before and I have what you asked to bring. I have two proposed instructions to substitute for 2.50.

MR. PLATT: Well --

THE COURT: Oh, we are on 1.

MR. PLATT: First of all, such evidence was received [646] and may be considered by you only for the limited purpose for determining if it tends to cause the injuries suffered by Cory McGuire was not accidental.

That overstates it a bit, because the injuries themselves are at issue. They tend to show the absence of, they tend to show the intent with which the Defendant acted, which goes certainly to the accidental shots suggested.

They also, the prior injuries also have a different function in that they tend to impeach the credibility of Mrs. McGuire.

THE COURT: I intend to give that. The question is do you want it tacked on to here or do you want to --

MR. PLATT: I don't care. I am amenable to any reasonable suggestion. I think 2.50 states it and I don't think you want to put an addendum to it to incorporate the Defendant's requested language is agreeable with me as long as you emasculate 2.50, because 2.50 addresses itself to intent and identity, both of which are the subjects

of the proposed instructions. So, I don't understand the necessity of special instructions.

MRS. SIMPSON: Your Honor, it is my recollection that when we discussed the introduction of these prior injuries, it was made clear that there was to be no implication or that they didn't imply that my client was connected to them in any way. That they were just there for the purpose of establishing the battered child syndrome.

The problem with the instruction 2.50 is that it does make that connection. It says that there has been [647] presented evidence of these prior offenses.

MR. PLATT: Well, of course that offer of proof was made before Mrs. McGuire got up and pulled her little act.

THE COURT: Uh-huh. That is for impeachment for her.

MR. PLATT: And that also comes in for the truth of the matter. It impeaches her and it establishes as a fact --

MRS. SIMPSON: Well, there was not any other independent evidence about the ribs, about the anus. I don't think that it did accomplish that purpose. There were not prior statements of Mrs. McGuire saying that they had, she had broken the ribs or that Mr. McGuire had broken the ribs or anything else that was inconsistent with what she said.

THE COURT: Well, the broken ribs comes in for the battered child syndrome.

MRS. SIMPSON: And I am saying it comes in for that limited purpose.

MR. PLATT: The jury can infer from the existence of the broken rib identification, it is like you may not see the brick layer making a wall, lay the first brick, but if you see him laying the thirty seventh, it is a fair inference that he is the one who laid the first one, the fifth one, the fifteenth one, especially if there is no one else around.

MRS. SIMPSON: Now, Your Honor, I think the Prosecutor is trying to get in what he couldn't have gotten [648] in –

THE COURT: What happened to 1101B?

MR. PLATT: 1101B has no application here. We are a battered child case. Everything, even including Joseph, if we are going to rely on that one, which again without analysis has no problem with the similars used in Joseph, in Joseph it was the beating which came in about the sibling.

MRS. SIMPSON: It shows battered child syndrome.

MR. PLATT: And it showed that Harold Joseph was the perpetrator of the murder. It takes it out of the accidental trauma.

THE COURT: That's right.

MR. PLATT: You can't do one without the other. They are to infer and connect. If you say it has no purpose, you are essentially to the jury. We can say it is

not accidental and you can't identify the perpetrator by reason of it.

THE COURT: What is the thing you are saying you don't want done?

MRS. SIMPSON: I don't want the instruction to say that there was evidence of prior offenses. I want the instruction to say that those evidence of prior injuries were introduced for the limited purpose of establishing the battered child syndrome and the reason we did that was to show that this was not accidental.

MR. PLATT: You have evidence of prior offenses and, you know, you have to tell the jury there is evidence of prior offenses. I mean, it is like the sun is up on the [649] sky right now even though you can't see it. Then you have to qualify it to say you are not entitled to infer therefrom that the man is a man of bad character, violent disposition.

MRS. SIMPSON: That's right.

MR. PLATT: I don't know how you get away from that unless error is invited here, and I am certainly not going to sit still for that.

THE COURT: Well, what modification are you requesting to the statement she is making?

MR. PLATT: The opening paragraph in 2.50, I believe, says there has been evidence of other offenses.

Let me turn to the page, here.

THE COURT: Evidence has been introduced for the purpose of showing that the Defendant committed a crime

other than for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or the he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show impeachment of prior testimony or establish the battered child syndrome.

MR. PLATT: Okay, or the existence of the intent which is a necessary element of the crime charged. The identity of the person who committed the crime, if any of which the Defendant is accused --

MRS. SIMPSON: I think the identity certainly can't come in. The facts don match those cases in which similars are brought in to show identity.

[650] MR. PLATT: I beg to differ to that. Start with Weisberg and run them all the way through, Judge, and they are there.

MRS. SIMPSON: I am citing the cases under 1101B.

MR. PLATT: Well, 1101A and B are considered in the similar authority under the battered child syndrome cases. In fact, I have never found a battered child murder case or battered, or a 273 or A or B prosecution in which similars were held erroneously admitted.

MRS. SIMPSON: I thought we had that all straightened out before. That the purpose they were coming in for a limited purpose.

MR. PLATT: I have a thirty three page brief that I prepared in the Dursk case.

Well, the points and authorities are twenty pages long.

THE COURT: Let me ask you this, this part about the clear connection between the other offenses and the one on which the Defendant is accused, so that it may be logically concluded that if the Defendant committed the other offenses, he also committed the crime charged in this case. You are saying he can't get that?

MRS. SIMPSON: Yes. I am saying that. I am saying that under 1101B, you have to, before you can bring that kind of similar in, you have to show that there is a preponderance of the evidence connecting Mr. McGuire to those prior offenses.

Now, what we are doing here is we are saying well, [651] he did the last one, therefore, he must have done the first one and because he did the first one he must have done the last one. It is a real bootstrapping option.

THE COURT: It is the only purpose of the battered child syndrome to show that somebody had access and was able to do these things, and you are not saying who did it. You are saying he may have done it or otherwise --

MR. PLATT: Some facts do on double duty, obviously.

THE COURT: Yes.

MRS. SIMPSON: Your Honor, my understanding was just to show the act and everybody in the initial

discussion of this said that the only purpose of this was to show that the death was not accidental.

THE COURT: But, this is saying a clear connection between the offense and the other offense and the one which the Defendant is accused.

MRS. SIMPSON: I understand that is what it is saying.

THE COURT: Well, what is the purpose of having a battered child syndrome if you are not going to use the connection?

MRS. SIMPSON: To show some accidental infliction.

THE COURT: No, I think --

MRS. SIMPSON: Nonaccidental infliction of --

THE COURT: I am going to give, I am going to give that portion of it.

MRS. SIMPSON: What, which portion?

THE COURT: Some evidence was received and may be considered by you only for the limited purpose of determining [652] if it tends to show:

1. The impeachment of prior testimony,

2. To establish the battered child syndrome.

Then, a clear connection between the other offense and the one which the Defendant is accused, so that it may logically be concluded that if the Defendant committed these --

Do we have any other ones?

MRS. SIMPSON: Did you decide on the Defendant's proposed jury instruction No. 2?

THE COURT: If we are going to do it this way, there is no need in giving it.

MRS. SIMPSON: So, you are denying?

THE COURT: I am going to deny these two and incorporate it in this.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Respondent,	)	H-3748
vs.	)	
MARK OWEN MC GUIRE,	)	
Appellant.	)	

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REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF ALAMEDA
HONORABLE BENJAMIN TRAVIS
[March 17, 1982]

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[756] Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person

of bad [757] character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,

2. To establish the battered child syndrome, and

3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	A017800
Plaintiff and Respondent,	)	(Alameda County Super. Ct.
v.	)	No. H 3748)
MARK O. McGUIRE,	)	Filed Jan. 15, 1985
Defendant and Appellant.	)	

Defendant Mark O. McGuire was convicted by a jury's verdict of the second degree murder of his six-month old infant daughter, Tori. He appeals from the judgment which was entered upon the jury's verdict.

We affirm the judgment for the reasons we now state.

Evidence adduced at the trial, presumably found true by the jury, revealed the following.

Defendant McGuire, and his wife, Daisy, brought their infant child Tori into the emergency room of an Alameda County hospital one evening. The child was bluish in color, not breathing, and bruises appeared upon her body. Her father, McGuire, explained that Tori suffered recently from a cold, and had that evening injured herself when she fell from a couch. Prompt medical

measures of doctors and nurses were unavailing, and Tori died within the hour.

McGuire was thereafter charged with the murder of the child.

Expert medical witnesses at the trial testified to the following. When Tori was brought to the hospital, she indicated little or no signs of life, her body was cool, and she showed no heartbeat or pulse. She had a "relatively recent" bruise on her chest, with older multiple bruises around it. And there were blue marks on the infant's ears, and scar tissue indicating a tearing wound of her rectum.

An autopsy on Tori disclosed at least 17 separate contusions on her chest and around 30 in her abdominal area. They were "quite fresh," and suggested "perhaps the knuckles or fists striking the skin." An examination of her internal organs revealed that her liver had been split in two, her pancreas was lacerated and almost torn in half, her right lung and a large vein near the heart were damaged, and her lower intestine was lacerated. And she had several partially healed rib fractures. Such injuries appeared to have been caused by the same force or blows which caused the other injuries. The injuries could not have been caused by a fall from a couch; and nothing but the application of "blunt force to this child" could have caused them. A medical witness said: "I don't think you can separate injuries, one from another, those types of injuries. A tremendous number of contusions all over the

front of the body, the neck area, and the injuries to the abdomen are totally inconsistent with falling even 16 feet."

The child's rectal injury was at least six weeks old, and was unlikely to have been caused by passage of hard stools; more likely it was caused by "the forceful insertion of a finger, or foreign object, or both."

The consensus of the People's professional medical witnesses was that Tori was a "battered child."

Tori had been in the custody of McGuire and her mother during the entire six months of her life.

While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

To police officers McGuire explained that "the baby must have fallen and struck the walker." And when an officer expressed doubt that her condition was consistent with a fall, McGuire said "maybe some Mexicans came in."

McGuire denied striking or abusing the child.

Mrs. McGuire testified at the trial. For the first time, there she said that she had been mad at Tori because of her crying, and had hit her on the day of the baby's death.

A neighbor of the McGuires, in the same apartment building, testified at the trial to matters occurring before Tori's death. She had "heard some ruckus and normally

at that time there is just doors closing and cars starting up to go to work, but this time I heard noises, voices saying please don't, please don't, I got up and looked out my bedroom window and I saw Mark [McGuire] having Daisy [McGuire] up against the wall with his legs to her stomach, choking her and she is trying to pull away." On another occasion Daisy appeared "rather upset and she had looked as if she was crying because I saw the tears from her eyes. [She said that Mark had] hit her across the face."

The neighbor testified also that she had observed McGuire pick up the infant by "one of her arms." She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other "bad things." Mrs. McGuire, the witness said, was a "very caring mother" toward Tori, who was never seen to "abuse the child" in any way.

And evidence indicated that McGuire and his wife were the only persons with Tori on the day of her death.

We state McGuire's several appellate contentions as phrased by him.

I. Contention: "The trial court erred in admitting evidence of prior injuries which were in no way tied to appellant."

It was the People's theory that Tori's death was brought about by McGuire's "child battering," which

culminated in the events of the day of her death. And proof of the "battered child syndrome," has expressly been held admissible in this state.

A leading case on the subject, *Landeros* v. *Flood*, 17 Cal.3d 399, 408, has stated: "It appears from the literature that the battered child syndrome was first tentatively identified and reported to the medical profession in the early 1950s. Further surveys and analyses of the syndrome followed. . . . California courts have not been oblivious to this development. In a prosecution for child abuse reviewed in 1971 -- the same year as the events here in issue -- the Court of Appeal held admissible the testimony of a physician identifying the typical elements of the battered child syndrome. (*People* v. *Jackson* (1971) 18 Cal.App.3d 504, 506 [95 Cal.Rptr. 919].) The court explained that a physician's diagnosis of battered child syndrome essentially means that the victim's injuries were not inflicted by accidental means, and 'This conclusion is based upon an extensive study of the subject by medical science.' (*Id.*, at p. 507.) Citing portions of the literature referred to hereinabove, the court concluded (*ibid.*) that 'the diagnosis of the "battered child syndrome" has become *an accepted medical diagnosis*.' (Italics added.) Indeed, the Court of Appeal added that 'Trial courts have long recognized the "battered child syndrome" and it has been accepted as a legally qualified diagnosis on the trial court level for some time. . . .' (*Id.*, at pp. 507-508; . . .)"

And more recently the high court in *People* v. *Bledsoe*, 36 Cal.3d 236, 249, has said: "In *People* v. *Jackson* [18 Cal.App.3d 504] -- the first such case in California -- the court explained that '[t]his syndrome means that a child has received repeated and/or serious injuries by non-accidental means. . . . [T]he criteria for the "battered child syndrome" . . . are (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect . . . [¶] A finding . . . of the "battered child syndrome" . . . simply indicates that a child found with the injuries outlined above has not suffered those injuries by accidental means.' (18 Cal.App.3d at pp. 506-507.) As this description suggests, the battered child syndrome cases fall well within the mainstream of a long line of California decisions which permit an expert medical witness to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself. . . ."

Under this authority, proof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

II. Contention: "Mistrial should have been granted when the highly inflammatory 'Mexican intruder' statement was elicited at trial."

McGuire argues that disclosure of the "inflammatory Mexican intruder statement" was not timely made to him under the trial court's discovery order.

As earlier noted, a uniformed police officer, not assigned to investigate the case, had commented to McGuire that the child's injuries seemed inconsistent with a fall from the couch. It was then that McGuire said, "maybe some Mexicans came in." The officer, believing the remark of no importance, made no note or report of it, and the prosecutor did not learn of the remark until a few minutes before it was offered in evidence at midtrial. The remark was relevant evidence, susceptible of an inference that such an absurd explanation might indicate a consciousness of guilt.

The trial court, following a hearing, concluded that there had been no intentional violation of the discovery order, and that the evidence's tardy disclosure was excused. The following courtroom colloquy took place.

"The Court: Let me ask you this. Since he didn't have this information before and didn't have an opportunity to give you this discovery before, if you have got a surprise element, then what do we need to enable you to deal with this situation? . . . If you need some time to do some investigation or check anything else out

brought out of the surprise element, I am willing to give you that. But as far as if you want to wait until your cross-examination and have somebody check something out or do anything, I am willing to accommodate you that way.

"Ms. Simpson [defense attorney]: I would be asking for some kind of instruction.

"The Court: Before we do that, why don't you do your investigation or whatever it is, if you are asking for time, then let's deal with it and then when we come back then we can decide how to best handle it. It may be something that you are going to get anyway in the natural course of things. If you could have gotten it in the natural course of things, then it may not be that damaging. . . . I feel that if there is a need for you to have further time to investigate into the origin and scope of this comment that is alleged to be made by your client, then I am willing to accommodate you.

"Ms. Simpson: I would like to have that opportunity.

"The Court: Okay. Can you do that by tomorrow morning?

"Ms. Simpson: I think I probably can."

We perceive neither abuse of discretion, nor error, in the trial court's resolution of the problem.

III. Contention: "The trial court erred in admitting appellant's statement which was the fruit of an unconstitutional interrogation."

On the evening of Tori's death, police officers, investigating the case, had questioned both McGuire and his wife. At that point McGuire was *not* under arrest or in custody; he had been so informed and the police had no intention of arresting him. And the *Miranda* admonition was *not* given. The couple were then asked to come to the police station the following day, and the decision to appear was theirs. Both parties "readily agreed." But by the time of their police station visit the next day, suspicion had focused on McGuire. Before any questioning, he was given an appropriate *Miranda* admonition, and the parties reiterated their earlier statements.

McGuire's instant argument is that the *first* police inquiry was in violation of *Miranda*, and that his subsequent Mirandized statements, offered in evidence at the trial, were its unconstitutional "fruits." The superior court had disagreed.

"[T]he trial court's ruling on a *Miranda* issue may not be set aside by us unless it is 'palpably erroneous.'" (*In re Eric J.*, 25 Cal.3d 522, 527.)

In ruling that McGuire's questioned statement might be admitted in evidence, the trial court stated: "There is nothing in here to indicate any reluctance on the part of the McGuires to go there. Their child had just died and there was an inquiry as to what was the cause of death. Nobody knew anything at that particular point in time. They were just trying to gather information. It was not

until Dr. Hermann does an autopsy that they become aware of the fact that there were multiple bruises and this was the cause of death. At that point in time, he was Mirandized and he was given his rights and gave a statement."

The *Miranda* requirement applies only to "custodial interrogation." In *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495, the nation's high court stated:

"Our decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' 384 U.S. at 444. Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense. *Mathis* v. *United States*, 391 U.S. (1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. . . ."

The trial court's comment was well supported by law, and by the record. Its ruling was *not* "palpably erroneous."

IV. Contention: "Prosecutorial misconduct was so prejudicial that appellant was denied a fair trial."

McGuire makes four assignments of such misconduct.

It is first argued that the prosecutor charged in his jury argument, that Mrs. McGuire's "confession" that she had "hit" Tori on the date of the child's death, was fabricated. Such a statement had some record support. It was accordingly not misconduct.

It is also argued that "the D.A. implied that court rulings were incorrect." We find nothing in the record reasonably supportive of the argument. And the prosecutor's reference to first degree murder was patently harmless, for, as noted, the jury's verdict was of second degree murder.

Moreover, we note that as to *three* of the four assignments, no trial court objection was made, and that as to *all* of them no alleviating jury admonition, which surely would have dispelled any conceivable prejudice, was sought. The misconduct charges are for those reasons not cognizable on appeal. (*People* v. *Green*, 27 Cal.3d a, 27-36.) And as said in *People* v. *Fosselman*, 33 Cal.3d 572, 581: "[G]enerally such [claims of misconduct] are deemed waived if the defendant does not object to them at trial. . . . He may raise the issue for the first time on appeal only if the trial court could not have cured the harm flowing from the misconduct by a prompt admonition to the jury. . . . In the present case the harm could have been cured by timely warnings, and hence defendant may not now be heard to complain."

The judgment is affirmed.

Elkington, Acting P.J.

WE CONCUR:

Newsom, J.

Holmdahl, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102
MARCH 21, 1985

I have this day filed Order

HEARING DENIED

No. **A017800**

PEOPLE

vs.

MARK O. McGUIRE

Respectfully,

Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK OWEN McGUIRE, Petitioner, v. WAYNE ESTELLE, Respondent.	No. C 85-6521 TEH ORDER

Petitioner Mark McGuire was convicted of second degree murder in Alameda County Superior Court for the killing of his infant daughter. On May 12, 1982, petitioner was sentenced to a term of 15 years to life for the murder, and is currently serving this sentence at the California Men's Colony in San Luis Obispo. The California Court of Appeal affirmed his conviction, and the California Supreme Court denied his petition for a hearing. Petitioner applied to this Court for a writ of habeas corpus, alleging violations of his federal constitutional rights by the state trial court that convicted him, and this Court issued an Order to Show Cause. There are presently five claims before this Court: 1) denial of due process based on the improper admission of prior act evidence; 2) denial of due process based on erroneous jury instructions with respect to the admission of prior act evidence; 3) violation of the procedural

protections afforded by *Miranda v. Arizona*, 384 U.S. 430 (1966), based on the improper admission of a statement at trial; 4) denial of due process based on prosecutorial misconduct during the prosecutor's closing argument; 5) denial of due process based on denial of discovery. Having considered the papers of both parties and the entire record presented, this Court hereby denies petitioner's application for a writ of habeas corpus.

FACTS

About 9:00 p.m. on July 7, 1981, petitioner and his wife brought their six month old baby daughter to the Emergency Room of Kaiser Hospital in Hayward. The screening nurse noticed that the baby was bluish in color and not breathing. She immediately took the baby to an emergency treatment room, and then returned to the screening area to obtain a medical history. Petitioner told the nurse that the baby had a cold recently and had hit her head that morning when she fell off of the couch. The efforts of doctors to save the baby were unavailing, and she was pronounced dead at 9:45 p.m.

Sharon Levine, M.D., assisted in treating the baby and testified at trial that the child was essentially lifeless with no vital signs when brought to the hospital. Dr. Levine also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruises around it, black and blue marks on her

ears, and scar tissue indicating tearing around the rectum. An autopsy performed by Paul Herman, M.D., on July 8 revealed at least 17 contusions on the baby's chest, and 29 more on her abdominal area. When he examined her internal organs, Dr. Herman found that the baby's liver was split apart, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of the large intestine was lacerated. Dr. Herman also discovered evidence of rectal tearing, which was a least six weeks old, and evidence of several partially healed rib fractures which were approximately seven weeks old.

The police arrived at Kaiser Hospital at 9:45 p.m., about the same time the baby was pronounced dead. The police separated the McGuires and briefly questioned them at the hospital about the baby's injuries. Petitioner indicated to Officer Lapic that the baby might have fallen off the couch and struck the walker which was next to it, although he was not sure. Petitioner was not given *Miranda* warnings before or during the questioning at the hospital, and he was not informed by police or by hospital personnel that the baby had died.

Petitioner and his wife were then taken to the Hayward Police Department in separate cars, and separately questioned there without *Miranda* warnings. Petitioner's wife told police that she had not hit the baby and that she did not know whether her husband had. At the end of the interview, the police told her that the baby

was dead. Petitioner told police that his wife had gone outside to make a telephone call, leaving the baby on the couch, and that he heard the baby cry while upstairs using the bathroom. When he came downstairs, he said, he found the baby lying on the floor. At the end of the interview, the police told him the baby had died but that they would not know the cause of death until the coroner completed an autopsy.

The police then drove petitioner and his wife to their apartment, had them sign a "Consent to Search" form, and then proceeded to take pictures and measurements of the home. Following the search of the apartment, petitioner was interviewed briefly in the parking lot to determine whether inordinate pressure had been applied to the baby's chest in an effort to revive her. In addition, Officer Lapic questioned petitioner outside the presence of other officers about the origin of the baby's bruises and was told that "Maybe some Mexicans came through the door" while he was upstairs, a statement that was not revealed until Officer Lapic's testimony at trial. No *Miranda* warnings were given up to this point.

The police called the McGuires the next day, July 8, and asked them to come to the station to discuss the coroner's report. Petitioner arrived at the station for questioning and there was advised for the first time of his rights under *Miranda*. He waived his rights and proceeded with the interview. About halfway through the interview, he was told that the coroner's report indicated the baby

had been beaten to death. Petitioner was arrested at the termination of the interview. His wife was not arrested and was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she had beaten the baby just prior to her husband's arrival at the house on July 7.

DISCUSSION

1. Admission Of Prior Act Evidence

In addition to Dr. Levine's testimony that the baby had sustained at least 46 contusions on her chest and abdomen, evidence was introduced of several partially healed rib fractures which were about seven weeks old and of a tearing wound of the rectum which was about six weeks old. Based on this evidence of past injuries, in addition to the more recent injuries causing death, both Dr. Levine and Dr. Hermann concluded at trial that the baby was a battered child. Petitioner now argues that this evidence of prior injuries to the baby, for which he was not on trial and to which he was not tied, was prejudicial and denied him due process of law.

For the limited purpose of showing that injury or death resulted from nonaccidental means, California courts have allowed admission of evidence of prior acts under California Evidence Code Section 1101(a). *See People v. Bledsoe*, 36 Cal.3d 236, 249 (1984). A diagnosis of

battered child syndrome, based on evidence of past injuries, is not an opinion that any particular person caused the injuries, but relates solely to the likelihood that the injuries were accidentally inflicted. *People v. Jackson*, 18 Cal.App.3d 504, 506-507 (1971). In this case, evidence of the two types of prior injuries was admitted by the trial court to support a diagnosis of battered child syndrome and prove that the baby's death was not accidental. This was a proper use of evidence under California evidence rules.

Since the evidence was admissible under state evidentiary rules, petitioner must demonstrate that a constitutional right was implicated by its use in order to merit habeas corpus relief. *Engle v. Isaac*, 445 U.S. 107, 119 (1982). Introduction of evidence must be so prejudicial as to result in a denial of fundamental fairness. *Palmer v. DeRobertis*, 738 F.2d 168, 170 (7th Cir. 1984). No showing of prejudice has been made by petitioner with respect to admission of prior act evidence. Petitioner argues that the prior act evidence was irrelevant, because no defense of accident was ever presented, and cumulative, because testimony of doctors at trial already established that death was not the result of accident without resort to prior act evidence.

The evidence, however, was relevant to the prosecutor's case-in-chief, despite the lack of an accident defense, in order to show that death was the result of criminal agency and to rebut the statement introduced at

trial that the baby may have died from falling off of a couch. In addition, the contention that the evidence was cumulative is speculative on petitioner's part. Even though the testimony of Dr. Levine supported the view that death was not the result of accident, without resort to prior act evidence, it cannot be said that this testimony alone conclusively established that position. Thus, the prosecution was allowed to introduce additional evidence, including evidence of prior injuries, to show the battered child syndrome and prove that death was not the result of accident. Moreover, even if admission of prior act evidence was irrelevant and/or cumulative, petitioner has not shown that it was so prejudicial as to amount to a denial of fundamental fairness. *See DeRobertis*, 738 F.2d at 170; *Cronnon v. State of Alabama*, 587 F.2d 246, 250 (5th Cir. 1979), *cert. denied*, 440 U.S. 974 (1979); *Thomas v. Cardwell*, 626 F.2d 1375, 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 889 (1981).

2. Jury Instructions Concerning Evidence Of Prior Acts

The state trial court instructed the jury on the use of prior acts evidence, including evidence of the two prior injuries to the baby, as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than

that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:

1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,

2. To establish the battered child syndrome, and

3. Also a connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case. You are not permitted to consider evidence for any other purpose.

Petitioner argues that Part 3 of this instruction improperly allowed the jury to base its verdict on acts for which he was not on trial and to which he was not connected, instead of limiting the use of the prior act evidence to show absence of accident.[1/]

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1. Petitioner also argues that Part 3 of this instruction allowed the jury to connect testimony that he treated the baby roughly on one occasion and that he slapped his wife on another occasion to the offense charged, because the jury might have believed those to be the "other two offenses" referred to. In reviewing the instruction, we find no merit to this contention. Part 1 and 2 of the jury instructions sufficiently indicate the use to which evidence of those two prior acts was to be put -- the slapping incident to rebut Daisy McGuire's testimony that she had no cause to be afraid of her husband, and the rough handling incident to rebut Daisy's testimony and help establish the battered child syndrome. Moreover, the reference in Part 3 of the instruction to "the other two offenses," when read in the context of the entire instruction and the trial, can only mean to refer the jury to the two prior injuries to the baby, not the slapping and rough handling incidents. Although the "two offenses" should have been specifically named in the instruction, this lack of clarity did not significantly prejudice petitioner's case at trial. *See United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985).

Federal habeas corpus relief is not available to set aside a conviction because of an erroneous jury instruction unless the error rendered the trial so fundamentally unfair as to deny due process. *Ahlswede v. Wolff*, 729 F.2d 1108, 1111 (9th Cir. 1983); *Quig v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980); *Shepard v. Nelson*, 432 F.2d 1045, 1046 (9th Cir. 1970); *Trujillo v. Stone*, 384 F.Supp. 633, 635 (N.D. Cal. 1974). The erroneous instruction must be so prejudicial as to affect the entire trial not merely an instruction which is "undersirable [sic], erroneous or even 'universally condemned'". *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). The appraisal of the significance of error requires a comparison of the instructions actually given with those that should have been given. *Henderson*, 431 U.S. at 154; *Cupp*, 414 U.S. at 146-147.

It is a close question whether Part 3 of the jury instruction, allowing the jury to connect evidence of the baby's prior injuries to petitioner and then to the offense charged, was in violation of the California Evidence Code.[2/] However, we need not reach this issue because petitioner has not demonstrated that any possible error rendered his trial so fundamentally unfair that he was denied due process. *Ahlswede*, 720 F.2d at 1111. Admission of evidence of past acts, for the possibly improper purpose of connecting petitioner to those past acts and then to the offense charged, did not "infect the entire trial". *See Henderson*, 431 U.S. at 154. Examination of the trial record reveals that there was substantial evidence, however circumstantial, to support the jury's finding that the baby's death was the result of a murder and that petitioner was responsible. Admission of prior act evidence did not amount to a "crucial, critical, highly significant factor" in the jury's finding of second degree murder. *See Love v. Young*, 781 F.2d 1307, 1312-1313 (7th Cir. 1986). The jury heard evidence that

2. California Evidence Code Section 1101(c) makes evidence of other crimes inadmissible when offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged. *People v. Nottingham*, 172 Cal.App.3d 484, 495 (1985). On the other hand, Evidence Code Section 1101(b) makes admissible evidence of prior acts relevant to prove some fact expressly in issue, such as the motive, intent, knowledge or identity of the perpetrator of the crime charged. Whether evidence is relevant under Section 1101(b) depends additionally on whether its probative value outweighs any undue prejudice. *People v. Tassell*, 36 Cal.3d 77, 88 (1984).

petitioner was in the house at the time of the baby's death and that his wife, the only other person in the house that day, stepped outside before the baby had been fatally injured. The jury heard petitioner's wife testify. This and other evidence allowed the jury to decide petitioner was behind the baby's death notwithstanding any prior act evidence.

3. *Miranda* Violation

Petitioner spoke with police and investigators several times on July 7, the day that he and his wife brought their injured baby to the hospital. No *Miranda* warnings were given to petitioner before or during any of these July 7 discussions. On July 8, petitioner was asked to come to the police station and when he arrived was given *Miranda* warnings before questioning took place. At trial, the prosecution introduced one of petitioner's statements, made on July 8, after *Miranda* warnings. Petitioner now urges that this statement was involuntary and in violation of his Fifth Amendment rights, because even though it was made after proper administering of *Miranda* warnings, it was the fruit of prior illegal interrogations by investigators.

Miranda warnings are required whenever a person questioned is in custody or the restraint on his freedom of movement is of a degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1123 (1983); *Oregon v.*

Mathiason, 429 U.S. 492, 494 (1977). Mere presence at the police station cannot be necessarily equated with custody. *See Beheler*, 463 U.S. at 1123. Although this Court must independently make the legal conclusions as to whether a petitioner was in custody at the time of a statement, and as to whether statements were voluntary, this Court must presume the correctness of all state court factual findings, unless there is no factual support for them in the record. *Summer v. Mata*, 449 U.S. 539, 545 (1981).

The state court examined the discussions between petitioner and investigators voluntarily and while petitioner was not in custody.[3/] We find ample support in the record for this position. No restrictions were placed on petitioner's freedom of movement during any of the July 7 discussions, including those taking place at the police station. Upon accompanying the police officers to the station on July 7, petitioner was specifically told that he was not under arrest and was under no obligation to go there. Because all of the July 7 questioning took place while pettioner [sic] was not in custody, no *Miranda* warnings were required and the July 8 statement used at trial was not the fruit of prior illegal interrogation.

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3. The trial court did not consider the statement made at the apartment complex to one of the officers that "Maybe some Mexicans came through the door." However, this statement was also made voluntarily and while petitioner was not in custody, and does not alter our conclusion that all July 7 questioning was noncustodial.

Petitioner further argues that police used trickery and deception during the July 7 discussions by withholding from him information that his baby had died and that he was a suspect in the death. Petitioner contends that this deception rendered the July 7 questioning coercive and tainted the subsequent statement given after *Miranda* warnings. This Court finds no support in case law for the view that trickery or deception render questioning coercive. Petitioner was told he could refuse to speak and could request a lawyer and was aware that any statement he made could be used against him. Waiver of his rights on July 8 was thus free and voluntary and the statement coming out of the July 8 questioning was properly introduced against him. *See Moran v. Burbine*, 106 S.Ct. 1135, 1142 (1986).

4. Prosecutorial Misconduct

Petitioner argues that the prosecutor made several prejudicial remarks during closing argument which constituted misconduct and denied him due process of law. Only one of the allegedly prejudicial statements was objected to at trial by petitioner's counsel. That objection came at the beginning of the prosecutor's argument, during which the prosecutor discussed first degree murder in this second degree murder case. Petitioner's counsel, in his state appellate court brief submitted to this Court, claims that because this objection was overruled, he did

not want to continue to make objections during the closing argument which would almost certainly be overruled. The remarks complained of which were not objected to include: 1) statements implying that petitioner's wife offered testimony which was part of a defense plot to suborn perjury; 2) statements made that the crime would go unpunished if the jury believed petitioner had not commited [sic] the crime because his wife had been granted immunity; 3) an inflammatory statement that if the jury believed petitioner, it should send him home to pick up his other recently born baby; 4) references made to inflammatory and controversial cases in an attempt to link the apparent miscarriage of justice found in those cases to a not guilty verdict for petitioner.

Under California law, claims of misconduct can only be reversed on appeal if objected to at trial. *People v. Fosselman*, 33 Cal.3d 572, 580-581 (1983). Under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the failure to observe a state's "contemporaneous objection" rules results in a procedural default which precludes habeas corpus relief. The only exception to this default rule occurs when a petitioner can demonstrate that there was "cause" for his failure to raise the objection at trial, and "prejudice" accruing from the failure to object. *Engel v. Isaac*, 456 U.S. at 129; *see also Hines v. Enemoto*, 658 F.2d 667, 673 (9th Cir. 1981). Even where instances of prosecutorial misconduct are properly objected to at the state trial, a federal court is limited to determining solely

whether the defendant was denied due process. *Donnelly v. DeChristofoto*, 416 U.S. 637, 642 (1974). The touchstone of due process is the fairness of the trial, not the misconduct of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219-220 (1982).

Petitioner has effectively defaulted on those alleged instances of prosecutorial misconduct which were not objected to at trial. Failure of counsel to object to a prosecutor's statements for the strategic reasons does not satisfy the "cause" prong of the *Sykes* standard, and petitioner's argument, that his counsel failed to object at trial because he did not want to be continuously overruled, amounts to a failure to object for strategic reasons. *See Hines*, 658 F.2d at 673. In addition, although petitioner has preserved his claim that the prosecutor's references to first degree murder in his closing argument constituted misconduct, petitioner has made no showing of a constitutional violation. Petitioner has not demonstrated that his trial was rendered so fundamentally unfair by the prosecutor's remarks that due process was denied. *See U.S. v. Foster*, 711 F.2d 871, 883 (1983); *Thomas v. Cardwell*, 626 F.2d 1375, 1381 (9th Cir. 1980).

5. Dehial Of Discovery

In his petition, petitioner argues that the prosecution's violation of a discovery order denied him his

constitutional rights to a fair trial.[4/] The discovery order in question called for the prosecution to release all statements made by petitioner to police officers during any of the questioning preceding trial. Petitioner made a statement at his apartment in response to Officer Lapic's questioning regarding the origin of the baby's bruises, that "Maybe some Mexicans came through the door." This statement was not revealed to the defense before Officer Lapic testified at trial. Petitioner contends that the prosecutor's failure to comply with the discovery order and reveal the statement before trial violated his due process rights for two reasons. First, petitioner claims that the revelation of Officer Lapic's questioning regarding the origin of the bruises could have been persuasive to the trial court at the Motion to Suppress that the interrogation violated *Miranda*. According to petitioner, Officer Lapic's questioning indicated that the officer knew the criminal degree of force used upon the body. Second, petitioner maintains that his lack of awareness of the statement regarding Mexicans left his counsel "ill-prepared" to select the jury.

The Court finds that petitioner's claims lack merit. Even considering Officer Lapic's questioning of petitioner,

4. This claim is properly before the Court at this time even though the claim was not included in this Court's earlier Order to Show Cause. Petitioner's counsel has fully briefed the issue for this Court, and the Court finds that it is able to make a determination of this claim after careful review of petitioner's arguments and of the record before the Court.

this Court finds that the interrogation of petitioner did not violate his *Miranda* rights. In addition, this Court finds that counsel's lack of awareness of petitioner's statement did not violate petitioner's due process right to an adequate opportunity to voir dire the jury. Therefore, petitioner is not entitled to relief on his claim for violation of the discovery order.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is denied.

IT IS FURTHER ORDERED that petitioner's motion for reconsideration of application for bail pending determination of petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

DATED: July 15, 1987

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	)	No. 87-2522 D.C. No. CV-85-6521-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted June 14, 1988
San Francisco, California

Filed May 8, 1989

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

Opinion by Judge Wiggins

*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial was error and denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six-month-old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

At trial, one of the baby's treating physicians testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating tearing around the anus. A doctor who performed an autopsy on the body testified that there were at least seventeen contusions on the baby's chest and twenty-nine more on her abdomen. Examination of the internal organs revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her large intestine was lacerated. Over McGuire's objection, the doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire's wife was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she, and not her husband, had beaten the baby.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254(a). Order to show cause issued on February 26, 1986. In its original response, the state of California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. *Exhaustion*

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted

the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1/] Thus we may reach the merits of McGuire's claims.

II. *Past Injuries.*

This court reviews the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held in violation of the Constitution or laws of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire

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1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

contends that admission of evidence of the baby's prior injuries, coupled with a jury instruction that allowed the jury to infer that if he committed the prior offenses he committed the charged crime, deprived him of due process. An erroneous evidentiary ruling will not cause a writ to issue unless a specific constitutional guarantee has been violated or the error is of such magnitude that the result is a denial of fundamental fairness. *United States v. DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). Before a federal court may overturn a state court conviction based on an incorrect or erroneous jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The erroneous jury instruction must have rendered the trial so fundamentally unfair as to have denied McGuire due process. *Ahlswede v. Wolff*, 720 F.2d 1108, 1111 (9th Cir. 1983) (per curiam), *cert. denied*, 469 U.S. 873 (1984).

At trial, the prosecution introduced evidence that the baby had been physically abused in the past. Some of this evidence also indicated possible sexual abuse. The evidence was admitted pursuant to California law allowing such evidence to show that a child was a victim of the "Battered Child Syndrome." "The syndrome means that a child has received repeated and/or serious injuries by non-

accidental means. . . ." *People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *see also People v. Steger*, 16 Cal.3d 539 549 n.4, 546 P.2d 665, 671 n.4, 128 Cal.Rptr. 161, 167 n.4 (1976). Proof of the syndrome "essentially means that the victim's injuries were not inflicted by accidental means. . . ." *Landeros v. Flood*, 17 Cal.3d 339, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976). In other words, proof of the syndrome demonstrates that a child has suffered repeated injuries over a period of time. These cases demonstrate that the California courts have been careful to limit proof of the syndrome to show that the child had not accidentally suffered the injuries. The additional finding that the injuries were probably caused by a particular person may not be made simply on the basis of proof of the syndrome itself. *See Jackson*, 18 Cal.App.3d at 507, 95 Cal.Rptr. at 921.

Jackson and *Landeros* make clear that proof of the syndrome does not prove who caused the injuries. That fact, though it may be inferred from proof of who was in contact with or cared for the child, is separate and distinct from proof of the syndrome itself. *Id.* In the case at bar, no one claimed that the child died accidentally. The *prosecution* introduced McGuire's pretrial statement that the injuries that killed the baby might have been caused by her falling off the couch. McGuire's defense at trial was not predicated on this or any other proof of accident. Rather, he attempted to prove that his wife had killed the

baby. The undisputed evidence of the massive injuries to the baby overwhelmingly refuted any inference of accidental death. The only permissible proposition this evidence could prove was whether the baby had suffered accidental or intentional injuries. This proposition was not at issue in this case. Thus, the probative value of the evidence of these prior injuries was negligible.

In addition, the prejudicial nature of this evidence was inherently great. *Cf. DeRobertis*, 738 F.2d at 171 (in a due process analysis of questioned evidence, the issue is whether the probative value of the evidence outweighs the prejudice to the accused). Proof of prior injuries to a small baby, coupled with the sexual nature of some of the injuries, inevitably prejudices McGuire. More significantly, there was little proof that McGuire was responsible for these injuries. It is certainly logical to infer that the primary care givers of the baby hurt and sexually molested the child on some prior date. The jury, however, was presented with no direct proof of whether McGuire or his wife caused these prior injuries. Either could have been responsible. One possibility, however, had been foreclosed by the prosecution. By offering the wife immunity, the jury was left with only one option -- to find McGuire guilty of the murder. Proof of the prior injuries, not necessary to prove that the baby's death was purposeful, could only have further prejudiced McGuire in front of the jury.

The prejudicial quality of the evidence was exacerbated by an instruction given to the jury. The trial court instructed the jury on the prior injury evidence as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. . . . Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show
>
> . . .
>
> a connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed the other offenses, he also committed the crime charged in the case.

This instruction specifically told the jury that if it thought McGuire committed the other two "offenses" they could find him guilty of the charged offense. The instruction alone would probably constitute error of constitutional dimension. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985); *United States v. Winters*, 729 F.2d 602, 604 (9th Cir. 1984). Certainly, coupled with the inherent prejudicial quality of the evidence itself, the error was of such magnitude to deny McGuire a fundamentally fair trial. We hold that McGuire was denied due process by

admission of this evidence and its associated jury instruction.[2/]

CONCLUSION

We are troubled that our disposition does not do justice in this case. A baby has been killed. Only the father and mother had access to the baby. One or the other, or perhaps both, are responsible for the death. This appeal, however, only concerns McGuire. Perhaps the state authorities should examine whether the mother fraudulently negotiated her grant of immunity, and if so, whether the immunity can be withdrawn. We express no opinion as to whether the evidence justifies a retrial of McGuire, his wife, or both, for murder.

We REVERSE the district court's denial of McGuire's petition for a writ of habeas corpus. We REMAND to the district court for the grant of a conditional writ. The state is permitted 90 days from this remand to refile.

REVERSED AND REMANDED.

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2. Given our disposition of this case, we do not reach or decide the appellant's *Miranda* claim.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE,	
Petitioner-Appellant,	**No. 87-2522**
vs.	**D.C. No. C-85-6521 TEH**
WAYNE ESTELLE, Superintendent, California Men's Colony at San Luis Obispo,	**Filed May 19, 1989**
Respondent-Appellee.	

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

INTRODUCTION

In an opinion filed on May 8, 1989, a panel of this Court reversed the District Court's order denying a petition for writ of habeas corpus, and ordered the State of California to grant petitioner a new trial. This petition for rehearing and suggestion for rehearing en banc is filed within 14 days, as required by Federal Rules of Appellate Procedure [FRAP] 40.

Respondent believes that a rehearing is necessary in order to address material points of fact and law overlooked in the decision. Specifically, the panel relied upon an interpretation of the evidence on other injuries to

the six-month old murder victim which is both unsupported by the record and never argued by petitioner in this proceeding or in any state court. The panel only discusses a portion of the limiting instruction relating to this evidence. Next, we note that the panel failed to discuss cited authority permitting the admission of other crimes evidence in child-killing cases, some of it from the Circuit. Finally, the panel opined that the prosecutor's grant of immunity to petitioner's wife was "questionable." That action was never objected to by petitioner in any proceeding; it was entirely inappropriate for the panel to consider it.

The panel also concluded that petitioner had adequately exhausted his state remedies, even though he had not presented certain of the issues raised to the California Supreme Court. A recent opinion of the United States Supreme Court, filed after this case was submitted but before it was decided, requires reconsideration of that holding and the precedent from this Circuit upon which it was based.

Respondent additionally suggests, pursuant to FRAP 35, that rehearing en banc is appropriate for two reasons. First, it is necessary to secure uniformity of decision within the Circuit. Other panels have recognized the admissibility of prior child abuse evidence in federal prosecutions; state court authorities and prosecutions should be evaluated similarly. Second, the question of

when issues are viewed as exhausted by this Court is of critical importance to the State of California.

ARGUMENT

I.

FAILURE TO EARLIER PRESENT ISSUES RAISED IN HIS PETITION FOR HABEAS CORPUS TO THE CALIFORNIA SUPREME COURT IN HIS DISCRETIONARY PETITION FOR HEARING REQUIRES DISMISSAL OF THE PETITION FOR FAILURE TO EXHAUST STATE REMEDIES.

As did the District Court, the panel rejected respondent's argument that petitioner failed to exhaust state remedies with respect to two of the issues raised in his petition for writ of habeas corpus. It is conceded that petitioner raised all of his issues in the California Court of Appeal, but it is asserted that he presented only two of them in a petition for hearing to the California Supreme Court. The panel concluded, relying on *Maxwell v. Sumner*, 873 F.2d 1031 (9th Cir. 1982), that presentation of any issue in the hearing petition was sufficient to exhaust all issues under the state court's former rules of procedure. Slip opn. at 4832-4833. We submit that *Maxwell* should be reconsidered in light of the recent decision of the United States Supreme Court in *Castille v. Peoples*, ___ U.S. ___, 109 S.Ct. 1056 (1989).

In *Maxwell*, this Court concluded that it was unnecessary for a defendant to specifically raise an issue in a petition for hearing to the California Supreme Court so long as it was raised in the California Court of Appeal. Since a grant of review under the procedure applicable to petitioner's case, see slip opinion at 4833-4834, n. 1, vacated the lower court opinion, issues not raised in the petition were not waived for purposes of later consideration by the Supreme Court. This Court recognized that the "purpose of a petition for a hearing in the California Supreme Court is to convince that court to exercise its *discretion* to hear the case." 673 F.2d at 1034, n. 1 (emphasis added).

The issue in *Castille*, *supra*, was the significance for federal exhaustion purposes of the denial of a petition for allocatur by the Pennsylvania Supreme Court. Under Pennsylvania law, such review is not a matter of right but depends on an exercise of sound judicial discretion. 109 S.Ct. at 1058. The Supreme Court concluded that denial of a request for discretionary review does not, in and of itself, constitute fair presentation of an issue to the state court for federal exhaustion purposes. 109 S.Ct. at 1060. This holding is particularly significant in petitioner's case.

The Supreme Court has required that, in order to be exhausted, an issue be "fairly presented" to the state court in the same manner that it is raised in the federal habeas corpus petition. *Castille*, *supra*, 109 S.Ct. at 1060;

Picard v. Connor, 404 U.S. 270, 275 (1971). The same legal theory and underlying facts must be presented. *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3rd Cir. 1986). For example, a claim that the state trial court abused its discretion in applying a state rule of criminal procedure is "entirely different" from an argument challenging the constitutionality of that rule as applied in the circumstances of a particular case. State courts must be allowed to consider the implications of a constitutional attack. *Boggs v. Evitts*, 818 F.2d 534, 536 (6th Cir. 1987).

In this case, petitioner not only failed to argue to the state courts that other crimes evidence issue raised a federal constitutional claim, he did not present two of the issues in the habeas corpus petition *at all* to the California Supreme Court. If, as *Castille* holds, denial of discretionary review does not constitute exhaustion, failure to even present the issue to such review must be viewed as inadequate. The fact that grant of hearing would ultimately have allowed all of the California Court of Appeal issues to be argued is irrelevant; it is impossible to know whether the California Supreme Court would have found the omitted issues provided more compelling reasons to grant review, even if those actually presented did not. Respondent submits that the *Maxwell* view (for exhaustion purposes) of prior California procedure cannot survive the holding in *Castille*.

The fact that the issue upon which this Court reversed the state court murder conviction was presented

to the California Supreme Court is not significant, even assuming that the form of its presentation was adequate exhaustion. This Court has "read *Rose v. Lundy* [455 U.S 509 (1982)] as requiring dismissal of the entire petition without reaching the merits of any of its claims where exhausted and unexhausted claims are combined. [Citations omitted]. The Supreme Court's direction to dismiss such 'mixed petitions' is clear and unequivocal, and leaves no discretion to consider hypothetically the claims which had been exhausted." *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983). Because other claims remained unexhausted, the District Court (and thus, the panel) should have dismissed the entire petition.

Respondent urges this Court to grant rehearing in light of *Castille*. Given the significance of that decision and its impact on the circuit's view of California procedure, rehearing en banc is appropriate.

II.

THE PANEL'S HOLDING THAT IT WAS ERROR TO INTRODUCE EVIDENCE DEMONSTRATING PRIOR INCIDENTS OF CHILD ABUSE IGNORES THE FACTS IN THE CASE, RELIES UPON AN INCOMPLETE ANALYSIS OF THE LIMITING INSTRUCTION, AND OVERLOOKS FEDERAL AUTHORITY RECOGNIZING THE ADMISSIBILITY OF SUCH EVIDENCE.

The panel concluded that petitioner was prejudiced by the admission of evidence demonstrating prior acts of child abuse and by a jury instruction relating to the evidence. The decision is factually and legally inaccurate and should be reconsidered, for several reasons.

The panel referred more than once to evidence that Tori, the six-month old victim, had suffered "sexual abuse." Slip opn. at 4835. Respondent assumes this is a reference to evidence that she had sustained damage to her anus. There was *never* any suggestion, either by the prosecutor in argument or in any of the testimony presented by the state, that the injury was sexual in nature. Moreover, Daisy McGuire, defendant's wife and the child's mother, testified that she had pulled down on Tory's bowels a week or two before the child was killed because she was

having trouble defecating. RT 406.[1] There is no basis in the record for concluding that the jury viewed this evidence as demonstrating sexual abuse of the child.

The panel also asserted that the prior abuse evidence was only marginally relevant, because petitioner did not claim at trial that Tori's death was accidental. It expressly criticized the prosecutor's decision to introduce petitioner's statements to the police (in which he offered an accident defense), then impeach those assertions with the evidence of "Battered Child Syndrome." Slip opn. at 4835. The criticism ignores the fact that the prosecutor was obligated to prove death by a criminal agency; it suggests no federal constitutional prohibition against demonstrating the falsity of petitioner's statements to the police. California law specifically authorizes the prosecutor to introduce such evidence to show consciousness of guilt. *People v. McDowell*, 234 Cal.App.2d 54, 56-57 (1965). Federal courts have also recognized that it is appropriate to anticipate and counter defenses by use of other crimes evidence in the prosecutor's case-in-chief. *United States v. Lewis*, 759 F.2d 1316, 1349, n. 14 (8th Cir. 1985); *United States v. Evans*, 697 F.2d 240, 248, n. 8 (8th Cir., 1983). Petitioner should not be allowed to profit by his lies to the police, simply because he abandoned his first line of defense. The fact that he lied was relevant and probative

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1. RT refers to the transcript of the state court proceedings, all of which were lodged by Respondent with the District Court.

evidence which the prosecutor was entitled to present to the jury.

The panel then found that the error in admitting the other crimes evidence was exacerbated by the trial court's limiting instruction. It concluded that, standing alone, the instruction would "probably" constitute error of constitutional dimension. Slip opn. at 4837. This is not the test. Rather, it must be specifically shown that the instruction so infected the entire trial that the conviction violated due process. *Cupp v. Naughton*, 414 U.S. 141, 147 (1973); *Quigg v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980).

More disquietingly, the panel quoted only a portion of the instruction. The jury was specifically advised that other crimes evidence was not intended to show bad character or criminal disposition,[2/] a limitation which this Court found to be significant in *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). *Butcher* was one of the cases cited in the panel opinion. Slip opn. at 4837. As this Court recognized in *United States v. Winters*, 729 F.2d 612, 614 (9th Cir. 1984) (the other case cited in the panel opinion), it must be assumed that the jury followed the

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. 2. The panel excised the following admonition in its discussion of the instruction: "Such evidence if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes." CT 756-757. It is fundamental that the jury instructions must be considered as a whole. *Francis v. Franklin*, 471 U.S. 307, 315 (1981).

limiting instructions. *See also*, *Parker v. Randolph*, 442 U.S. 62, 73 (1979).

To the extent that the instruction would permit an inference of guilt based on the prior incidents of child abuse, such an inference is expressly permitted by the federal courts in infanticide or child abuse cases. *See, e.g., United States v. Woods*, 484 F.2d 127, 133 (4 Cir. 1973); *United States v. Harris*, 661 F.2d 138, 142 (10 Cir. 1981); *United States v. Leight*, 818 F.2d 1297, 1304 (7th Cir. 1987). This Court has followed *Woods* in a federal prosecution. *United States v. Lewis*, 837 F.2d 415, 419 (9th Cir. 1988) (evidence of prior child abuse was admissible because of its "probative value in disproving claims that the defendant lacked intent or that the child died by accident"). The state prosecutor in this case had precisely the same interest. The panel's failure to consider any of the federal authority cited to it by respondent compels reconsideration. The blunt fact is that neither admission of the evidence, nor giving of the instruction, nor both, denied petitioner due process.

III.

THE PANEL'S OPPOSITION TO THE STATE'S DECISION TO GRANT IMMUNITY TO PETITIONER'S WIFE IS AN IMPROPER BASIS UPON WHICH TO GRANT THE PETITION.

In its conclusion, the panel expressed an undisguised distaste over the prosecutor's decision to grant Daisy McGuire immunity from prosecution, and even suggested that the state reexamine that decision and possibly withdraw the immunity. Slip opn. at 4837. Those observations were entirely inappropriate.

First, there was never any objection, in any court, by petitioner to the grant of immunity. Indeed, under California law, he had no standing to object. *People v. Randolph*, 4 Cal.App.3d 655, 660 (1970). The same rule obtains in federal prosecutions. *United States v. Ellis*, 595 F.2d 159, 163 (3rd Cir. 1979.)

Second, federal courts have "no supervisory authority" over state judicial proceedings. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Even in a federal prosecution, the decision to grant or deny immunity belongs exclusively to the executive branch. *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984); *Snelling v. United States*, 719 F.2d 1067, 1068, n. 3 (10 Cir. 1983).

Finally, the Court's implied criticism, that the prosecutor may have let the guilty party go free, ignores

a substantial amount of contrary evidence: (1) the testimony of a woman in the hospital waiting room who heard Mrs. McGuire ask petitioner what had "really happened" to Tori while she was in his exclusive custody, RT 174-149; (2) Mrs. McGuire's complaints to neighbors and friends about the way petitioner treated Tori, RT 470, 496, 498; (3) the testimony of a neighbor who saw petitioner pinch Tori's face while forcing food into her mouth, RT 469-470; and (4) Mrs. McGuire's attempt to exonerate petitioner from the stand, despite inconsistencies with her prior statements and the grant of immunity. RT 342, 348. In short, there was substantial evidence of petitioner's guilt, and the jury was fully aware of his wife's status in the case and her efforts to assist him. Because the panel impermissibly relied upon the immunity grant as a basis for reversing the conviction, this Court should grant a rehearing.

CONCLUSION

For the reasons stated above, respondent respectfully submits that a rehearing or rehearing en banc should be granted.

DATED: May 19, 1989

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	No. 87-2522 D.C. No. CV-85-6521-TEH ORDER

Before: SCHROEDER and WIGGINS, Circuit Judges and
STEPHENS* District Judge

The opinion filed May 8, 1989 is withdrawn and is vacated.

SO ORDERED.

* Hon. Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

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FOR THE NINTH CIRCUIT

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Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted June 14, 1988
San Francisco, California
Opinion filed May 8, 1989 and withdrawn April 23, 1990

Filed May 4, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*, District Judge.

Opinion by Judge Wiggins

*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial, coupled with an instruction that permitted the jury to consider those prior acts as evidence of his guilt of the crime charged, were errors that denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

Because a proper consideration of McGuire's due process claim requires weighing the prejudice to him of the error he alleges, we examine the trial testimony in some detail.

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six month old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

The father, McGuire, was charged with second degree murder of his child.

At trial, the prosecution called Dr. Levine, the doctor who examined the baby at the hospital. She testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating a healed tearing around the anus. Doctor Levine opined that the rectal tear was not caused by constipation or fecal impactment. She testified that such scarring probably resulted from the forceful insertion of a finger or some other foreign object. The doctor also testified that the baby had suffered from seven earlier rib fractures.

A different doctor performed an autopsy on the baby and testified that there were at least 17 contusions on the baby's chest and 29 more on her abdomen. He testified that his examination of the internal organs revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her intestine was lacerated. The doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire made timely objection to all evidence of prior injuries as not being connected to him. The objections were overruled.

None of the foregoing evidence of injury to the child included evidence of who caused the injuries to her.

The prosecution also called a witness who had overheard McGuire talking to his wife in the emergency room of the hospital. The witness stated that McGuire's wife asked him "what really had happened?" and McGuire is reported to have responded that the baby had fallen from the couch.

A police officer was called by the prosecution. He testified that McGuire had told him that the child had fallen from the couch. The officer than told McGuire that the baby's injuries were inconsistent with a fall from the couch. McGuire thereupon responded that "maybe some Mexicans came in while I was upstairs."

McGuire's wife was next called as a witness by the prosecution. She was granted transactional immunity for her testimony although she had made no statement to the prosecutor prior to the trial. When asked about the circumstances of the baby's death, she testified that she, and not her husband, had beaten the baby. She gave a confused account of having struck the baby in the afternoon of July 7, 1981 and that the child did not move, cry, or cough thereafter.

McGuire's wife testified that on the afternoon of the 7th, after she struck the child, she left the house for about ten minutes and when she returned, the child was not breathing. She stated that she asked her husband what had happened and he said the child had fallen from the couch and struck the walker. She also testified that several weeks prior to the baby's death, she inserted her finger into the baby's rectum in an attempt to relieve her of constipation. She also testified to staying at a neighbor's house for four days prior to the 7th and had made inquiries about a battered woman's shelter.

The prosecution introduced evidence that a fall from a couch could not have produced the injuries causing the baby's death. The prosecution also introduced evidence that McGuire had treated the baby roughly in the past.

The defense countered with witnesses who testified they had never seen McGuire abuse the child. McGuire did not testify in his own defense.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254(a). Order to show cause issued on February 26, 1986. In its original response, the state of California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. EXHAUSTION

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California

Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1] Thus we may reach the merits of McGuire's claims.

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1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

II. THE CONSTITUTIONALITY OF APPELLANT'S CONVICTION

We review the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to habeas relief only if he is held in violation of the constitution, laws, or treaties of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire contends that the procedures used to convict him in state court violated his fourteenth amendment right to due process. U.S. Const. Amend. XIV. We agree.

A claim for deprivation of due process will succeed only if the trial court's errors rendered the trial arbitrary or fundamentally unfair. *Pennywell v. Rushen*, 705 F.2d 355, 357 (9th Cir. 1983). In the instant case we find that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered appellant's trial arbitrary and fundamentally unfair.

A. THE ADMITTANCE OF IRRELEVANT, PREJUDICIAL EVIDENCE

The trial court admitted extensive evidence of prior physical abuse the baby had suffered, including evidence of possible sexual abuse. However, that evidence has no

relevance to appellant because the prosecution did not establish that appellant inflicted those injuries.

In order for evidence to be relevant, it must have some probative value. *See, e.g.,* Fed.R.Evid. 401 (evidence to be relevant must make the determination of the action more probable or less probable than it would be without the evidence). Evidence cannot have probative value unless a party connects it to the defendant in some meaningful way. *See, e.g., United States v. Hooten*, 662 F.2d 628, 635 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982) (in order for prior act evidence to be admissible under the Fed.R.Evid. it must be "similar and close enough in time to be relevant"); *People v. Rivera*, 41 Cal.3d 388, 392, 710 P.2d 362, 364, 221 Cal.Rptr. 562, 564 (1985) (in bank) ("In order for evidence of a prior [act] to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the [prior act and the charged offense] must have enough shared characteristics to raise a strong inference that they were committed by the same person. . . . It is not enough that the two acts contain common marks.").

In the instant case, the prosecution made no such connection. The prosecution elicited evidence that McGuire was rough with the baby, and that on one occasion McGuire had squeezed the baby's cheeks. Daisy McGuire also stated that she feared leaving the baby alone with McGuire. We recognize the temptation to find that such evidence is enough to infer that McGuire caused

the prior rectal tearing and the broken ribs. However, we cannot permit a jury that temptation. Evidence of McGuire's petty meanness does not establish that he committed, or is even capable of, the extensive physical abuse inflicted on the child. It is precisely because anyone, including Daisy McGuire, could have inflicted those injuries that makes the prior injury evidence irrelevant.

We emphasize that the trial court's error was not simply that it admitted the prior evidence under the wrong evidentiary theory. Nor do we dispute that there are constitutionally permissible uses for admitting evidence of prior bad acts. *See* Fed.R.Evid 404(b) (evidence of other crimes, wrongs or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge identity, or absence of mistake or accident); ***United States v. Lewis***, 837 F.2d 415, 418-419 (9th Cir.), *cert. denied*, 109 S.Ct. 304 (1988) (evidence of prior child abuse properly admitted to show intent). However, acts which the prosecution did not connect to appellant cannot be characterized as *his* prior acts.

Furthermore, we find the introduction of such prior injury evidence highly prejudicial. The prosecution introduced evidence of prior injuries to the baby to establish that appellant was a child abuser, and for no other purpose, in a murder trial for the death of his child. The trial court incorrectly admitted the evidence pursuant to California law allowing past injury evidence to establish

the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

However, in the instant case, no claim was made that the child died accidentally. The prosecution attempted to prove Mark McGuire deliberately did it. The defense attempted to prove Daisy McGuire deliberately did it. Although the prosecution did not succeed in proving that the appellant caused the prior injuries, we cannot ignore that a trial of the grisly murder of an innocent baby implicates highly charged emotions. The unproven characterization of appellant as a child abuser maximized the prejudice flowing from the irrelevant evidence. *See Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988) (granting habeas relief where prejudicial effect of evidence so outweighed probative value that result was a denial of fundamental fairness); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing and remanding a denial of habeas corpus petition on basis that prejudicial effect of evidence might have risen to such magnitude as to deny fundamental fairness); *Bisaccia v. Attorney General of State of New Jersey*, 623 F.2d 307 (3d Cir. 1980) (same).

B. IMPROPER JURY INSTRUCTIONS

The trial court did not merely admit irrelevant, highly prejudicial evidence without comment. The trial court *instructed* the jury to use that evidence in the most improper way possible. We assume that the jury followed its instructions. *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 604 (1985). The trial court's jury instructions stated:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a connection between the other two offense (sic) and the one of which the defendant is accused *so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case.*
>
> You are not permitted to consider evidence for any other purpose.

(emphasis added).

Subsection 3 of the instruction is erroneous.[2/] It permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts. The rejection of such use of circumstantial character evidence in criminal cases has become "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions. . . ." Fed.R.Evid. 404(a) advisory committee's note.

Not only have we never condoned an instruction which permits a finding of guilt based on a conclusion that the appellant committed prior bad acts, we have consistently stressed the importance of a *limiting* instruction to confine the use of prior bad act evidence to the proper purpose for which the court admitted it. *See United States v. Green*, 648 F.2d 587, 593 (9th Cir. 1981) (admission of bad act evidence in conjunction with failure of trial judge to provide limiting instruction following admission of bad act evidence required reversal); *cf. Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) (no

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2. It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

due process violation resulted from wrongful admission of prejudicial evidence where instructions limited use of that evidence to find intent); *United States v. McCown*, 711 F.2d 1441, 1454 (9th Cir. 1983) (no due process violation resulted from admission of prior bad acts evidence where prejudice was minimal and trial judge offered to give a limiting instruction).

The damage done by subsection 3 is not limited by a qualifying instruction by the court. Nor is subsection 3 limited by the preceding subsections of the instruction. The first subsection simply warned the jury not to use the evidence of prior bad acts to find that McGuire was a bad person and therefore infer that McGuire was likely to have committed this crime. Subsection 3, however, informed the jury that it may find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses. For these reasons, the faulty instruction considered along with the admittance of the prejudicial evidence "so infected the entire trial that the resulting conviction violate[d] due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Nor do we believe that this error can be considered harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming. *See Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988) (error not harmless even when

evidence of petitioner's guilt was "impressive but not overwhelming.").

III. CONCLUSION

We find that the jury instruction which permitted the direct determination of guilt from evidence of prior injuries not connected to McGuire denied him due process. The severity of these errors sets this case apart from arguably similar cases in which we rejected claims that evidentiary error rendered a trial fundamentally unfair. For example, in *Lewis*, we found no due process error where the trial court admitted evidence of prior child abuse in a defendant's trial for the murder of his son. 837 F.2d at 418-19. However, *Lewis* suffered from neither of the errors we find determinative in the instant case. In *Lewis*, the testimony of two witnesses connected the defendant to the infliction of the prior injuries, and the trial court provided a limiting instruction. *Id.*, at 419.

Because the prejudicial effect of the errors discussed above amount to a denial of due process, we grant McGuire's habeas petition. However, we are also not blind to the fact that apart from those errors, only the barest threads connect McGuire to the crime. True, given the pattern of most child abuse cases, it is not unreasonable to assume that one or both of the baby's primary care givers were responsible for the baby's injuries and death. We are also mindful that in the emergency

room, McGuire answered unconvincingly in response to Daisy McGuire's accusation that McGuire bore responsibility for the baby's injuries leading to death. And evidence existed that McGuire had treated his wife and the baby roughly in the past. But these are mere shadows of guilt which leave ample room for reasonable doubt. Due process requires more than a simple intuitive feeling that the father may be guilty. It requires convincing proof.

We REVERSE and REMAND for a new trial.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant, v. WAYNE ESTELLE, Warden, Defendant-Appellee.	No. 87-2522 D.C. No. CV-85-6521-TEH ORDER AND DISSENT

Filed November 23, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

ORDER

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judges Kozinski and Trott would grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc. An active judge requested a vote on whether to rehear the matter en banc. The request failed to

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DISSENT

KOZINSKI, Circuit Judge, with whom Circuit Judge TROTT joins, dissenting from the order rejecting the suggestion for rehearing en banc.

Six month old Tori McGuire died in a hospital emergency room, the victim of appalling internal injuries: her liver was split in half, her pancreas was lacerated and split apart, her lower right lung and the large vein from her heart were damaged, and part of her large intestine was lacerated. No, little Tori was not the victim of a hideous automobile accident; nor had she been extracted from the rubble of an earthquake. She had been beaten to death. Her lifeless body, with dozens of contusions on her chest and abdomen, was brought to the hospital by her parents who claimed they didn't know what could have happened to her. Perhaps, the father said, "the baby fell off the couch" or maybe "some Mexicans" broke in and abused her while he was out of the room. Not taken in by these transparent falsehoods, the state brought charges against the father, Mark McGuire. A state jury convicted him of second degree murder; the conviction was affirmed on appeal.

A panel of this court now overturns the conviction, quite possibly forever. In so doing, it not only reaches a result that is contrary to simple justice and common sense, but does so in a way that will seriously interfere with the authority and autonomy of the state courts in many other criminal proceedings. Most fundamentally, the panel overturns the state conviction because it disagrees with the state court on questions of *state* law.[1] Worse, the panel punishes the prosecution for introducing what the court deems to be unnecessary evidence of the defendant's intent, even though intent is clearly an element of the crime with which McGuire was charged. Finally, the panel misapplies the teachings of *Chapman v. California*, 386 U.S. 18 (1967), and *United States v. Hasting*, 461 U.S. 499 (1983), by failing to consider "the entire record prior to reversing a conviction for constitutional errors that may be harmless." *Id.* at 509 n. 7.

This opinion is markedly out of step with the law of the Supreme Court and this circuit governing these sensitive and important issues. While en banc procedures are cumbersome and time consuming, such considerations

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1. A similar concern was raised by *Blair v. McCarthy*, 881 F.2d 602 (9th Cir. 1989, *cert. granted*, 59 USLW 3210 (Oct 2. 1990)(No. 89-1862), vacated as moot and remanded ___ USLW ___ (1990), where the first question presented was: "Has court below improperly and unduly expanded scope of federal habeas corpus relief by granting such relief in absence of any federal violation on sole basis of alleged violation of state procedural rule plus finding that it is 'reasonably probable' that different result would have occurred in absence of state law error?"

ought not deter us from maintaining uniformity in the law of the circuit, as well as correcting an obvious miscarriage of justice. Because my colleagues' decision not to take this case en banc lets stand what I consider to be a wholly unacceptable precedent, I must respectfully dissent.

Discussion

Tori McGuire's short life was the type of horror no sentient being should have to endure. In addition to the ghastly injuries that caused her death, the doctors who examined her discovered some earlier injuries -- rectal tearing that was at least six weeks old and several partially healed rib fractures that were approximately seven weeks old. The prosecution introduced evidence of these earlier injuries, and the trial court instructed the jury as to the inferences it could draw therefrom. This evidence and these instructions lie at the heart of the panel's decision to overturn the conviction. A dispassionate review of the state court proceedings, however, reveals that no error at all was committed, much less an error of constitutional dimensions, and that the disputed evidence was, in any event, not prejudicial given the overwhelming evidence of McGuire's guilt.

A. *The Panel Second-Guessed The State Courts On Questions Of State Law*

This is not an appeal from a federal criminal conviction; it is a state habeas corpus case. Our function is limited to determining whether the petitioner's constitutional rights were violated. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir.), *cert. denied*, 110 S.Ct. 344 (1989); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). In making that determination, we do not review issues of state law, such as evidentiary rulings; we are bound by the state courts' interpretations of the law entrusted to them. The panel disregards this limitation entirely and overturns Mark McGuire's conviction because it disagrees with the way the state court resolved questions of state law concerning the admissibility of evidence and the wording of jury instructions.

On the evidentiary question, the state trial court admitted proof of prior injuries for three separate reasons, one of them being that it tended to establish that Tori was a battered child, pursuant to a theory known as the "Battered Child Syndrome." The state court of appeal affirmed:

> [P]roof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

People v. McGuire, No. A017800, at 7 (Cal.App. Jan. 15, 1985), citing and discussing *People v. Bledsoe*, 36 Cal.3d 236 (1984); *People v. Jackson*, 18 Cal.App.3d 504 (1971); and *Landeros v. Flood*, 17 Cal.3d 399 (1976). Our panel flatly disagrees with this determination:

> The trial court incorrectly admitted the evidence *pursuant to California law* allowing past injury evidence to establish the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

901 F.2d at 754 (emphasis added).

What can one possibly say about this? The panel not only expressly states that the state court erroneously admitted the evidence "pursuant to California law," but it relies on two of the same cases that the state court of appeal relied on in reaching the opposite conclusion. Until reading the panel's opinion, I had thought the federal courts were bound by state court interpretations of the state rules of evidence. Apparently, however, the panel has now declared open season on state court evidentiary rulings in the Ninth Circuit.

The panel makes precisely the same mistake when it concludes that "[s]ubsection 3 of the [prior bad acts] instruction is erroneous." 902 F.2d at 755. The panel's only explanation for this conclusion appears in a footnote:

> It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

Id. at 755 n. 2. Once again, the panel cites only state law in support of its conclusion that the state courts committed error.

The panel does ultimately conclude that "the faulty instruction considered along with the admittance of the prejudicial evidence 'so infected the entire trial that the resulting conviction violate[d] due process.'" 902 F.2d at 755 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). This reference to the due process clause does not repair the damage done by the panel's earlier analysis. The problem is that, in order to conclude that there was a due process violation, one must first determine that the state trial court erred. The panel made that initial determination by relying almost exclusively on state law,

which it reads in a way directly contrary to the state court's reading.[2/]

B. *Evidence Of Intent Was Proper And Necessary*

In concluding that the evidence of prior injuries was improperly admitted, the panel suggests that the evidence was not relevant. *Id.* at 754. As discussed above, the panel had no business second-guessing the state courts on a question of state law. Having started down this path, however, the panel makes a collateral error, one with grave constitutional implications.

As the panel recognized, evidence is admitted pursuant to the Battered Child Syndrome theory to prove that the death was not accidental. *Id.* If the child has suffered a series of injuries as the result of child abuse, this tends to make it less likely that the injury in question resulted from a mishap. *People* v. *Jackson*, 18 Cal.3d 504, 507, 95 Cal.Rptr. 919, 921 (1971). The panel concludes that the evidence of prior injuries was irrelevant because

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2. I say *almost* exclusively because the court does sprinkle in citations to federal law, particularly the Federal Rules of Evidence. *See, for example,* 902 F.2d at 754 (citing FRE 404(b) and *United States v. Lewis*, 837 F.2d 415 (9th Cir.) *cert. denied*, 488 U.S. 923 (1988)); *Id.* at 755 (citing FRE 404(a) Advisory Committee note and *United States v. Green*, 648 F.2d 587, 594 (9th Cir. 1981)). The Federal Rules of Evidence, the Advisory Committee notes, and federal criminal cases are, of course, wholly irrelevant to a state habeas case, where the only issue is whether the trial violated constitutional norms. The panel's opinion in this case could well be construed as giving the Federal Rules of Evidence a constitutional cast. *See id.* at 755.

"in the instant case, no claim was made that the child died accidentally." *Id.* According to the panel, the only issue at trial was *who* killed Tori, not whether the killing was intentional.

This passage in the panel's opinion has serious implications: It suggests that due process may be violated by the admission of evidence which clearly goes to an element of the offense charged if it turns out that the defense does not put that particular element in issue. This reasoning, if it stands as the law of the circuit, will present state prosecutors with an intractable problem: Just how are they to know whether the defendant intends to put a particular element of the crime in issue? After all, the prosecution must go first and bears the burden of establishing every element of the crime beyond a reasonable doubt -- including, for second degree murder, malice aforethought, Cal. Penal Code §§ 187, 189 (West 1988). If the prosecution decides not to present proof of any element of the crime on the theory that the defense will not put that element in issue, the defendant automatically becomes entitled to a directed verdict of acquittal. James W. Moore and Jo D. Lucas, 5A *Moore's Federal Practice* ¶ 50.02[1] at 50-16.1 to 50-17 (2d ed. 1990). The simple reality is that, in a criminal case, *every* element of the crime is in issue; the defense is free to sit back and see how the prosecution's case shapes up, and then focus its attack where the prosecution is weakest.

The panel's insistence that intent was not an issue in the case is contradicted not only by elementary principles of criminal procedure, but by the record in this case as well. As the panel recognizes, McGuire at one time claimed that the baby was injured when she fell off the couch. 902 F.2d at 751. He later suggested that "maybe some Mexicans came in while I was upstairs." *Id.* How on earth was the prosecutor to know that McGuire would not raise one of these defenses when his turn came to put on evidence?"[3] More fundamentally, if the prosecutor decided to play it safe by introducing evidence in addition to the fatal injuries to prove that the death was not accidental, how can we say that the evidence was irrelevant? For the panel to look at the evidence after the case was closed and say that the prosecutor was too cautious in proving every element of the offense is nothing but 20/20 hindsight.[4]

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3. Indeed, early in the trial the prosecutor advised the court that he anticipated the defense would rely primarily on the "some Mexicans" theory, with "try[ing] to hang it on momma" a less likely alternative. Reporter's Transcript on Appeal, *People of the State of California v. McGuire*, H 3748 (RT) 213-24 (Book II).

4. As it turns out, the defense *did* raise the issue of intent, and very vigorously. Defense counsel objected to a jury instruction on second degree murder, stating "I don't think there is evidence of intent." RT 562 (Book V). She requested an involuntary manslaughter instruction, stating "my contention is that whoever killed the baby or hit the baby had no malice, had no intent to kill the baby." RT 619. With the agreement of both sides, the court instructed the jury that "[t]he unintentional killing of a human being is excusable and not unlawful when committed by accident," and that "[t]he burden is on the Prosecution to prove beyond a reasonable doubt that the homicide was not excusable." RT 762. During her closing argument, defense counsel argued that the prosecution had failed to establish intent: "Involuntary manslaughter . . . is an unlawful killing of a human being where there is no intent to kill and no malice. That is what we have here, if anything." RT 720. See also RT 718-19. In McGuire's motion for a new trial after the verdict came in, defense counsel asserted that the trial court had erroneously failed to instruct the jury on the requirement of specific intent. Clerk's Transcript on Appeal, *The People of the State of California v. McGuire*, H 3748 (CT) 155. Thus, while the panel appears to have labored under the misapprehension that McGuire had conceded or stipulated to intent, defense counsel was well aware of the state's burden of proof as to McGuire's state of mind, and pressed the issue forcefully.

What are state prosecutors in the Ninth Circuit supposed to do when presented with a situation such as that here? On the one hand, they face the possibility of a directed verdict or unfavorable jury instruction if they fail to prove an element of the case that somehow seems "obvious." On the other hand, under today's precedent, they face the possibility that a federal court -- with the benefit of hindsight -- will conclude that the evidence was not really necessary because that particular element of the crime was not contested by the defense. It is obvious that the McGuire prosecutor could not have guarded against this type of whipsaw; more troubling is that, even with today's precedent in hand, no prosecutor will know when to withhold evidence or when to include it until he sees the defendant's evidence, by which time it will be too late. In common parlance, this is known as a Catch-22.

C. ***Panel's Harmless Error Analysis Is Deficient***

It is well established that errors, even constitutional ones, do not warrant overturning a state conviction unless it is determined that the errors are not harmless. *Chapman v. California*, 386 U.S. 18-33 (1967). Except where the error is so fundamental that it is deemed harmful per se, which is not the case here, the federal court must examine the *entire* state court record to determine whether the jury would have reached a different conclusion absent the error. *United States v. Hasting*, 461 U.S. 499, 509 n. 7 (1983).

The panel here speaks the language of harmless error analysis but fails to perform the tasks associated therewith. The sum and substance of the panel's harmless error "analysis" is the following: "Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming." 902 F.2d at 755. The panel does not state that it has reviewed, or even seen the state court record; it does not discuss the evidence supporting guilt; and it does not analyze how the trial would have played out had the perceived errors been eliminated. Harmless error analysis that is so utterly devoid of analysis is no better than no harmless error analysis at all. At a bare minimum, it seems to me, the panel must represent that it has ordered the state court record,

looked at it, and undertaken the type of review mandated by the Supreme Court.

Quite frankly, it is impossible to review the record in this case and understand how the panel reached its conclusion. Take, for example, the error perceived by the panel as to the admission of the evidence under the Battered Child Syndrome. Even if the panel were correct in concluding that the evidence was improperly admitted for this purpose, *it does not matter*. The trial court found the evidence of prior injuries admissible for three distinct purposes: (1) to establish the existence of Battered Child Syndrome; (2) to show that McGuire had committed similar prior bad acts;[5] and (3) to impeach Mrs. McGuire's testimony that Mr. McGuire was kind to his daughter. RT 573-75 (Book V), 757. The state court of appeal found the evidence admissible on the first of these grounds, and so did not reach the other two. *People v. McGuire*, No. A017800, at 5-7 (Cal.App. Jan. 15, 1985).

Where a trial court admits evidence for three independent reasons, and we find one of them insufficient,

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5. The trial court treated Battered Child Syndrome and prior bad acts as separate evidentiary categories; it may be more accurate to say that evidence of Battered Child Syndrome is a subset of evidence of prior bad acts. For our purposes it makes no difference: A finding that evidence is inadmissible to prove Battered Child Syndrome says nothing about whether the evidence may be admitted for the broader purpose of showing prior bad acts.

our job is hardly done.[6/] All evidence is admissible for some purposes but inadmissible for others; we could reverse convictions any time we liked were we to focus on one purpose exclusively. Here, the panel did not find the evidence was inadmissible on the other two grounds; therefore, it is bound to assume that the evidence would have been admitted in any event. In light of the indisputable record on this point, I fail to see how McGuire suffered *any* prejudice from the alleged error regarding admission of evidence of the Battered Child Syndrome, much less a denial of due process.

But there is more. Even were we to assume, with the panel, that admission of the evidence was prejudicial error, the panel was required to decide whether the jury would have convicted anyway. See *United States v. Hasting*, 461 U.S. at 510-11. A determination on this issue required the panel to weigh the prosecution's case, the likely effect of the wrongfully admitted evidence and the likelihood that the jury would have come to a different result. A review of the record leads only to one conclusion: The jury would have reached exactly the

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6. That the state court of appeal only considered one ground for admission is not, of course, dispositive. Having found the evidence admissible on one ground, the court of appeal had no need to examine whether the evidence was admissible on other grounds as well. To find the evidence inadmissible -- and so highly prejudicial as to constitute a due process violation -- we must make sure that it is not in fact admissible on *any* of the grounds relied on by the trial court.

same verdict regardless of the errors perceived by the panel.

First, the record discloses that the prosecution's case was very strong indeed. In weighing the strength of that evidence, it must be kept in mind that there were only two plausible theories of the case: that the father abused Tori or that the mother did; no one else had access to the baby immediately prior to her death. While the 1500 page trial transcript contains a good deal of testimony establishing that the father did it, perhaps the strongest piece of evidence is the testimony of several witnesses who overheard a conversation between Mr. and Mrs. McGuire at the hospital while the couple was waiting to learn Tori's fate:

> While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

People v. McGuire, No. A017800, at 3 (Cal.App. Jan. 15, 1985).

This conversation makes no sense at all unless it was the father who abused the baby. Had the baby been

alone with the mother at the time she suffered the injuries, as Mrs. McGuire claimed at trial, one would have expected the accusations at the hospital to point entirely the other way. Not only did McGuire fail to question or accuse his wife, he lamely suggested the baby "fell off the couch" and did not protest her accusation that "you are responsible." Short of a videotape of the crime, it's not clear what better evidence the prosecution might have presented.

The fact is, child abuse cases are inherently difficult to prove: the evidence is usually circumstantial and often ambiguous; eyewitnesses seldom come forward because of family considerations; and the victims often are dead or too young to speak. See, for example, *United States v. Boise*, No. 89-30071, slip op at 12157 (9th Cir. September 27, 1990). It is rare indeed to have a case like this one, where the defendant makes what is tantamount to a spontaneous confession of his guilt. When this conversation is viewed in the context of all the other evidence presented to the jury, see *People v. McGuire* at 2-4, one must conclude that the prosecution's case was extremely strong.

Second, the prejudice flowing from any error would have been minimal. If I understand the panel's rationale correctly, it is that the prosecution failed to sufficiently prove McGuire's connection to the earlier acts of child

abuse. Even if that were true -- which it clearly is not[7] -- how was the defendant prejudiced? Evidence of the earlier abuse could *only* harm the defendant to the extent the jury was convinced he committed those acts. If the jury was in doubt, or believed that someone else (for example, Mrs. McGuire) committed the bad acts, its outrage over them would not have been directed at Mark McGuire.

Finally, it is highly unlikely that, absent the error, the jury would have reached a not guilty verdict because to do so it would have had to adopt the defense's alternative theory -- that the mother did it. Mrs. McGuire's

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7. The record contains ample evidence from which a rational jury could conclude that McGuire had been the perpetrator of the earlier injuries:

> -- Mrs. McGuire's statements to Detective Gillis to the effect that, when she bathed Tori, she noticed the child had bruises on her body. When asked how Tori might have gotten those bruises, Daisy responded:
> **McGuire:** I don't really know, you know, I am not the only one who is taking care of her.
> **Gillis:** Well, who else is taking care of her?
> **McGuire:** My husband, too, takes care of her.
> -- Testimony by a neighbor "that she had observed McGuire pick up the infant by 'one of her arms.' She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other 'bad things.' Mrs. McGuire, the witness said, was a 'very caring mother' toward Tori, who was never seen to 'abuse the child' in any way."

People v. McGuire, No. A017800, at 4 (Cal.App. Jan. 15, 1985).

> -- The fact that one of the injuries -- rectal tearing -- is sexual in nature, and of a type more likely made by a man than a woman.

"confession," made only after she was granted immunity and had the luxury of attempting to save her husband at no risk to herself, is halting and tentative, marked by evasion and lapses of memory. RT 333-39, 341-42, 351-58, 364, 385. It is also internally inconsistent, RT 353-56; contradicted by her earlier statements to the police and at the preliminary hearing, RT 370-75, 410-11, and by Mr. McGuire's own statements to the police, RT 209-10 (Book II), 251 (Book III); and inconsistent with the weight of the medical evidence.[8/] The jury deliberated for three days and had extended passages of the trial transcript read back to it, including large portions of Mrs. McGuire's testimony. RT 254A (Book I), 777. This jury was clearly not inflamed by passion. McGuire got no worse than he deserved.

It is this type of inquiry, or something akin to it, that the panel was required to pursue under *Chapman*. Its unsubstantiated assertion that the evidence against McGuire "was certainly not overwhelming" simply does not do the job.

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8. Mrs. McGuire claimed to have killed the baby some time in the afternoon, "[a] long time" before her husband returned home. RT 353; *see also* RT 348; *but see* RT 356 ("I beat my child when he, shortly before he comes home on that evening."). The infant most likely died within minutes of having been beaten. RT 139-140 (Book II). Yet when the McGuires took the baby to the hospital at nine in the evening, RT 87 (Book II), the doctors believed they had a chance of resuscitating the child because irreversible brain swelling had not yet begun, indicating that her death was very recent. RT 86, 98-99, 169-71 (Book II).

D. *Reprosecution Of McGuire May Be Precluded*

When a federal court grants a writ of habeas corpus, the state normally has the option of retrying the defendant. This is not the case, however, when there is a determination that the prosecution failed to meet its burden of proof on any element of the offense; under those circumstances, retrial is barred by the double jeopardy clause. *Burks v. United States*, 437 U.S. 1 (1978).

While the point is not entirely free from doubt, the opinion contains statements that could well preclude retrial of McGuire. Specifically, the panel casts aspersions on the prosecution's case by stating that "only the barest threads connect McGuire to the crime." 902 F.2d at 755. Worse still, the panel characterizes the state's evidence as suggesting no more than "mere shadows of guilt which *leave ample room for reasonable doubt*." *Id.* at 756 (emphasis added).

It is entirely possible that the state courts on remand will read these passages as holding that the prosecution failed to introduce sufficient evidence to meet its constitutional burden of establishing guilt beyond a reasonable doubt. Certainly it would be difficult to come up with language more clearly conveying this idea than that used by the panel. If the state court *does* construe the panel's opinion as precluding a retrial, there will be no possibility of correcting the error. Once McGuire is

released, the prosecution has no mechanism for coming into federal court to complain, as the state is not entitled to collaterally attack the state judgment.

Conclusion

The panel has overturned a state conviction, and has done so in a manner that seriously and unjustifiably interferes with the authority of the state courts, hamstrings state prosecutors and may result in the permanent release of a defendant who was justly and properly convicted of a heinous crime. We make a grave mistake by failing to take the case en banc to correct these errors and set the law of the circuit back on course.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 25, 1991

Mr. Dane R. Gillette
Deputy Attorney General
455 Golden Gate Ave., Rm. 6200
San Francisco, CA 94102

Re: Wayne Estelle, Warden
v. Mark Owen McGuire
No. 90-1074

Dear Mr. Gillette:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

Very truly yours,

William K. Suter, Clerk

Supreme Court, U.S.
FILED
APR 10 1991
OFFICE OF THE CLERK

No. 90-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

MARK OWEN McGUIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit exceeded its habeas corpus jurisdiction by finding a federal due process violation arising from a state trial court evidentiary ruling which the state appellate court found to be correct as a matter of state law.

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No. 90-1074

IN THE

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WAYNE ESTELLE, WARDEN,
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MARK OWEN McGUIRE,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 902 F.2d 749 (1990). A copy appears in the Joint Appendix at J.A. 98-114. The order denying rehearing and rehearing en banc, and the dissent from denial of en banc consideration is reported at 919 F.2d 578 (1990). It appears in the Joint Appendix at J.A. 115-134. The unreported order of the

District Court denying the petition for writ of habeas corpus appears in the Joint Appendix at J.A. 55-71. The unpublished opinion of the California Court of Appeal, First Appellate District, appears in the Joint Appendix at J.A. 42-53.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 4, 1990. Rehearing was denied on November 23, 1990. A petition for writ of certiorari was timely filed on December 17, 1990. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. On February 25, 1991, this Court granted certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part: "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district judge shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT

A. Procedural History

By information filed in Alameda County Superior Court on September 30, 1981, respondent Mark Owen McGuire was charged with one count of murder, in violation of California Penal Code section 187. On March 19, 1982, a jury convicted respondent of second degree murder. He was sentenced on May 12, 1982, to state prison for the statutory term of fifteen years to life.

On January 15, 1985, the California Court of Appeal for the First Appellate District affirmed the judgment of conviction. J.A. 42-53. The California Supreme Court denied respondent's petition for hearing on March 21, 1985. J.A. 54.

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California on August 30, 1985.[1/] The petition was denied in an unpublished order on July 15, 1987. J.A. 55-71.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On May 8, 1989, the court issued an opinion reversing the District Court and ordering the State of California to retry respondent. 873 F.2d 1323; J.A. 72-82. That opinion was vacated on

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1. An earlier petition was denied without prejudice on April 24, 1985, because respondent had not alleged that state remedies were exhausted.

April 23, 1990, J.A. 97, and a second opinion was filed on May 4, 1990. 902 F.2d 749; J.A. 98-114. The court again reversed respondent's conviction. Rehearing and rehearing en banc were denied on November 23, 1990, with two circuit judges dissenting from the denial of en banc review. 919 F.2d 578; J.A. 115-134.

B. Factual Background

About 9:00 p.m. on July 7, 1981, respondent and his wife, Daisy, brought their six-month old baby, Tori Aurora McGuire, to the emergency room of the Kaiser Hospital in Hayward. RT 186-187. Tori was bluish in color and not breathing. Nurse Susan Massaglia immediately grabbed the child and ran with her to the emergency treatment room. RT 188-189. The nurse later observed bruises on Tori's body. RT 188-189.

Ms. Massaglia returned to the screening area and asked the parents for a medical history. Respondent said that Tori had a cold recently. He also claimed that she had fallen off of the couch and hit her head sometime that morning. RT 191-192. Respondent did not mention any trauma or other event which could have injured Tori's ribs or her rectum. RT 192-193.

Dr. Sharon Levine examined Tori two or three minutes after the child arrived in the treatment room. Tori was in cardiac arrest, had no vital signs or independent pulse, her skin was cool, and her pupils were

restricted and fixed. RT 80, 82, 85-86. Tori had a large, "relatively recent" bruise on her upper left chest, with multiple bruises around it. RT 81, 86. Dr. Levine also observed black and blue marks on the baby's ears and scar tissue indicative of a tearing wound to the rectum. RT 83-85. Despite the best efforts to save her, Tori was pronounced dead at 9:45 p.m. RT 81, 87.

An autopsy was performed by Dr. Paul Hermann on July 8. He observed at least seventeen separate contusions on the baby's chest, and twenty-nine more on her abdomen. RT 124-125. The bruises were "quite fresh"[2/] and suggestive of a blow from a hand or fist. RT 129, 145.

Tori sustained extensive internal injuries. Her liver was split in two; her pancreas was lacerated and also torn in half; the lower right lung and large vein from the heart to lower body were damaged; and part of the large intestine was lacerated. RT 125-129. The destruction of the pancreas was an "extremely painful" injury. RT 90. If she was not unconscious, Tori would have been in "considerable pain." RT 140.

All of the injuries appeared to have been inflicted by the same blows which caused Tori's bruises. RT 141. The doctors agreed that it would require a great deal of force to cause such extensive internal damage.

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2. Dr. Hermann concluded that one bruise on the child's flank was probably several days older than the others. RT 146-147.

RT 91, 130. Dr. Hermann could posit no source other than the application of blunt force to explain Tori's injuries. RT 141. Given the combination of liver and pancreas damage, it was "most likely" that Tori died within minutes, not hours, after the blows were delivered. RT 140, 156-157. Nothing suggested that Tori's injuries occurred hours before her death. RT 169.

Dr. Hermann also discovered evidence of rectal tearing. The injury was at least six weeks old and unlikely to have resulted from constipation, although Dr. Hermann could not rule that out. RT 136-138. Dr. Levine did not think that the rectal injury was caused by constipation or fecal impactment. In her opinion, it resulted from the forceful insertion of a finger or foreign object into the rectum. RT 85.

An x-ray examination of the baby disclosed several partially healed rib fractures which were several weeks to two months old. RT 106-107. Such injuries in a child Tori's age are so "uncommon" as to be "unique." RT 107. The breaks were toward the front of the rib cage which is also unusual, even in adults. RT 110.

Dr. Levine and Dr. Hermann each concluded that Tori was a victim of battered child syndrome, RT 89, 92, 102-103, 139, described by Dr. Hermann as a "group of findings which when combined indicate that child had died as a result of mistreatment from another person, usually an adult." RT 120. An explanation for the child's condition which will not medically justify the injuries

sustained or their severity supports a diagnosis of battered child syndrome. RT 79-80. The doctors agreed that falling from a couch, striking a plastic walker, and landing on the floor could not have caused Tori's injuries. RT 89, 130-131, 141. A fall from sixteen feet, much less sixteen inches, would not explain the severity of Tori's internal damage. RT 141. Although bruises and broken bones can occur by accident, Dr. Levine had never seen a child with the number and severity of injuries suffered by Tori who had not been battered. RT 102-103.

As the doctors struggled to save their daughter, Daisy McGuire sat down next to Margaret Jurich, who was waiting to see a doctor. Mrs. McGuire was "very stoney faced" and Mrs. Jurich made no effort to talk to her. RT 175-177. Respondent walked around near the screening desk for a few minutes, then sat down between his wife and Mrs. Jurich. RT 177.

Mrs. McGuire asked respondent what "really happened." Respondent told her that he was upstairs and "guessed the baby fell off the couch." She continued to ask what "really" happened and respondent's answer was "always the same, I told you what really happened." At one point Mrs. McGuire said, "I am very patient. I can wait a long time. I want to know what really happened." RT 178. She also reminded respondent that Tori "was all right" when Mrs. McGuire left the house and insisted that he was "responsible" for the child's condition. RT 179. Respondent did not answer her. RT 179.

Hayward Police Officer David Lapic went to the hospital in response to a call about a child with unexplained injuries. RT 206. Respondent told him that he had put Tori on the couch and gone upstairs. He heard crying and found her on the floor. Respondent thought Tori "must have fallen and struck the walker." RT 209.

Lapic later went with the McGuires to their apartment. He had seen Tori's bruises before leaving the hospital and commented to respondent that he did not think they were consistent with a fall from the couch. RT 210, 252.[3] Respondent then suggested that "maybe some Mexicans came in" while he was upstairs, but conceded that nothing was missing or disturbed in the apartment. RT 210, 251. He also told Lapic that he was alone with the baby. RT 210.

Respondent was interviewed the next day by Hayward Detective Robert Gillis. He agreed to speak after being advised of and waiving his rights. RT 302-305.[4] Respondent admitted that only he and his wife had custody of Tori on the day she died. The baby was sick but did not have any trouble breathing. Respondent came

3. It was sixteen inches from the cushions of the couch to the carpeted floor. RT 202-203.

4. The jury heard an edited tape recording of the statement. RT 305. A copy of the transcript was included with respondent's traverse in the District Court and in the Excerpt of Record at the Court of Appeals.

home that night around 7:00 p.m. The couple ate dinner and talked, then Mrs. McGuire went out just before 9:00 to make a telephone call; she was gone for five to ten minutes. Tori was on the couch and looked like she was sleeping, so respondent went upstairs to use the bathroom. He heard the baby "crying out real loud" and found Tori "kind of wiggling around" on the floor. Respondent took her upstairs and put her in her crib; he insisted that Tori was "okay." When Mrs. McGuire came home she noticed that Tori was pale and having trouble breathing. Respondent thought the child's stomach hurt her, so they took her to Kaiser Hospital.

After being told that Tori was killed by a "severe blow," respondent suggested that she "might" have fallen on the walker. He denied hitting, killing, or playing rough with Tori. Respondent also said that his wife "always treated the baby with motherly kindness."

Daisy McGuire testified as a prosecution witness under a grant of immunity. RT 342, 427-428.[5] She stated that she hit Tori in the stomach before respondent came home on July 7. RT 342, 348, 364. Mrs. McGuire was mad and upset because the baby had been "crying and crying" all day. RT 356, 364. She also claimed to

5. The immunity had been granted during respondent's preliminary hearing. Outside the presence of the jury Mrs. McGuire assured the court that she was willing to testify so long as she still had immunity. RT 325. She did understand, however, that she could be prosecuted for perjury if she lied. RT 326.

have once pulled down on Tori's bowels when the baby was constipated. RT 406. Mrs. McGuire had never made these admissions to the police[6] or prosecutor before she testified, RT 386, and had refused to discuss her earlier statements with the District Attorney unless her own lawyer was present. RT 366-367. She was, however, still living with respondent, RT 331, 438, and had told him what she had done while he was in jail after the preliminary hearing. RT 385-386, 426. Mrs. McGuire also spoke to a defense investigator and discussed her prior statements and testimony at some length with respondent's defense counsel. RT 367, 429-430. She denied that she was afraid of respondent, RT 357, 389, 446; that respondent had ever hit her, RT 391, 443; or that she ever saw respondent hit Tori. RT 444.[7]

Mrs. McGuire's testimony conflicted with her earlier statements to the police. On the evening of July 7, Mrs. McGuire told Detective Gillis that when she bathed

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6. Mrs. McGuire did not tell the police about hitting Tori because she was pregnant and did not want her baby to be born in jail. RT 386-387. Her second child was born in November 1981 and had been taken away because of this case. RT 437. Mrs. McGuire never told her attorney in the custody proceeding that she had hit Tori because she considered that information to be "confidential." RT 431.

7. Mrs. McGuire insisted that friends whom she visited shortly before Tori's death misunderstood her request for information about a battered women's shelter. RT 358. She also denied telling her friends that respondent had attempted to toilet train their five-month-old daughter. RT 418-419.

Tori she sometimes noticed bruises on the baby's side. She did not know how they got there, adding that she was not the only person who cared for the child. Mrs. McGuire acknowledged that respondent also took care of Tori. She had asked respondent about the bruises, but he did not know how Tori got them. When Gillis asked whether respondent would hurt the baby, Mrs. McGuire replied, "I can't say . . . ." RT 371. She also stated that Tori was alive and "okay" when Mrs. McGuire left to make the telephone call. RT 372, 374.

On July 8, Mrs. McGuire again stated that Tori was breathing and uninjured when she left to make the telephone call. RT 379. When told that the baby had been killed by a blow to the chest, Mrs. McGuire denied hitting Tori. She did not know whether respondent killed Tori stating, "I can't, I really can't say anything, because I did not see what happened." She did, however, reiterate that she and respondent were the only people to have custody of Tori that day. RT 410-411.

Respondent told Mrs. McGuire that Tori had fallen from the couch. RT 412. At the hospital she asked him about this explanation because she was mad and it was "not so clear" to her what he meant. Mrs. McGuire wanted an explanation from respondent. RT 408. Later she testified that she wanted to know what had happened because she hoped that she was not responsible for Tori's injuries. RT 450-451.

Mrs. McGuire's testimony was also internally inconsistent. At one point she said that she hit Tori a "couple" of times. RT 422. On other occasions she was not sure how many blows she struck. RT 364, 461. Mrs. McGuire stated that Tori stopped crying after she was hit, RT 413; a few moments later she claimed the infant was still crying. RT 422.

Diane Short lived in the same apartment complex as the McGuires. RT 462. Early one morning she heard noises outside and saw respondent holding his wife against the wall with his knee in her stomach and choking her as she tried to pull away. RT 463.

On Memorial Day, Mrs. Short spoke to Mrs. McGuire, who seemed nervous and upset. She told Mrs. Short that respondent had hit her across the face. RT 466-468. Later that day Mrs. Short saw respondent feeding Tori. He roughly pinched the baby's cheeks and forced the food into her mouth. His action left marks on Tori's face. RT 469-470. Mrs. McGuire said she was afraid to leave Tori with respondent because he "pinched her cheeks and did bad things." RT 470. That afternoon Mrs. Short noticed bruises on Tori's thighs, buttocks, and face. RT 470-471. The marks on her face were in the locations respondent had grabbed Tori while he was feeding her. RT 475-476. On another occasion Mrs. Short saw petitioner pick Tori up by one arm and carry her to the car. RT 488-489.

From June 28 to July 2, 1981, Mrs. McGuire and Tori stayed with the Linders on Treasure Island. Mr. Linder knew respondent from the Navy. RT 491, 494-495. Mrs. McGuire complained that respondent was trying to teach Tori to swim and use the toilet at too young an age. She also stated that respondent would not allow Tori to cry. RT 496-499. Mrs. McGuire asked for information on a battered women's shelter and expressed concern about respondent obtaining custody of the child in a divorce. RT 499. Before Mrs. McGuire would return home with respondent, she made him write a promise to "treat Daisy good" and to be "a responsible husband." RT 361-362.

The defense focused on some difficulties between the McGuires. RT 528-530. Respondent also introduced testimony from neighbors about their observations on the day of the killing. RT 538-542, 551-552, 554-557. A babysitter who took care of Tori three or four times in April and May claimed that she never saw any bruises on the child. RT 563-564.

SUMMARY OF ARGUMENT

On July 7, 1981, Tori McGuire, the six-month old daughter of respondent, was beaten to death. She was covered with bruises and most of her internal organs were damaged. Respondent had sole custody of the child shortly before her death. He later asserted that Tori was

injured when she fell from a couch. As part of its case, the state presented expert testimony that Tori was a victim of battered child syndrome. The diagnosis was based, in part, on evidence of prior injuries, including partially healed broken ribs and a lacerated anus. Respondent was convicted of second degree murder and sentenced to state prison for fifteen years to life.

The state appellate court upheld admission of the battered child evidence based on well-established state law precedent. Relying solely on its own interpretation of state law and in partial reliance upon the Federal Rules of Evidence, the Ninth Circuit reversed respondent's murder conviction. It concluded that evidence of Tori's other injuries was inadmissible character evidence and that battered child syndrome testimony was irrelevant because respondent did not expressly raise an accident defense. The Ninth Circuit also found that a limiting instruction on the use of other crime evidence was improper and prejudicial. Both findings were premised on denial of a fundamentally fair trial under the Fourteenth Amendment.

The habeas corpus statute does not grant federal courts a roving commission to reinterpret state law or to reverse state criminal convictions simply because they disagree with the verdict. A federal habeas court is bound to accept the state's interpretation of its own law. An error of state law is ordinarily not cognizable on federal habeas corpus. Although the improper admission of evidence or an incorrect jury instruction might, in some

cases, result in the denial of due process, those situations are rare and narrowly drawn. This is not such a case.

Apart from its misunderstanding of state law, the Ninth Circuit completely misperceived the nature of battered child syndrome testimony. Its purpose is not to identify a particular person as the perpetrator, but to establish that the child's injuries were intentionally inflicted. The syndrome has found wide acceptance in all state and federal courts which have considered it, including the Ninth Circuit. The court's ruling threatens the use of battered child testimony and undercuts the ability of state courts effectively to prosecute and convict child abuse homicide cases.

This case graphically illustrates the need for further restrictions from this Court on the scope of federal habeas corpus jurisdiction. The tension created by excessive, appellate-style review of state courts by the lower federal courts undermines confidence in the criminal process and is inconsistent with this Court's recognition of state courts as fully committed to protecting the constitutional rights of criminal defendants. Moreover, it denigrates the prominence of the trial itself.

These problems are particularly acute where the petitioner claims that he was denied a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment. The lower federal courts widely disagree on the proper interpretation of fundamental fairness, in part because this Court has not articulated a test for assessing

whether a state criminal trial was fundamentally fair. The Court's habeas corpus jurisprudence has, however, recently emphasized the likely accuracy of a conviction in determining the scope of federal habeas review. Given those concerns, we submit that a defendant in a state criminal trial will not be denied fundamental fairness due to the admission of irrelevant, inflammatory evidence unless there is a reasonable probability that exclusion would have produced a more favorable result. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Even if the battered child evidence is excluded from this case, there is no reasonable probability that respondent would have obtained a different result. Because the outcome of his trial is reliable, respondent was not denied his right to fundamental fairness and due process.

ARGUMENT

I.
THE NINTH CIRCUIT EXCEEDED ITS HABEAS CORPUS JURISDICTION BY CONCLUDING THAT THE ADMISSION OF EVIDENCE AND USE OF A JURY INSTRUCTION DENIED RESPONDENT A FAIR TRIAL BASED ON ITS OWN INTERPRETATION OF STATE LAW.

The issue posed is whether federal courts reviewing habeas corpus petitions from state prisoners may employ the rubric of "fundamental fairness" to convert the Fourteenth Amendment into a code of evidence for state criminal trials. Although the question should answer itself, the opinion of the Ninth Circuit in this case demonstrates the need to further define and limit the reach of federal habeas corpus review of state convictions. In this argument we demonstrate why the Ninth Circuit erred by reversing respondent's second degree murder conviction. In Argument II, we suggest a test for determining when state law error has denied the defendant a fundamentally fair trial and due process.

A. The Limited Role Of Federal Habeas Corpus

"The role of federal habeas corpus proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Because federal courts have no supervisory authority over state judicial proceedings, they

are limited solely to correcting wrongs of a constitutional dimension. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). The scope of habeas corpus review is thus limited by "interests of comity and finality." *Teague v. Lane*, 489 U.S. 288, 308 (1989) (plurality opinion). A state criminal conviction challenged on federal habeas corpus is presumptively final and legal. *Barefoot v. Estelle*, 463 U.S. at 887.

This Court has long recognized that a "mere error of state law" will not justify habeas corpus relief. *Gryger v. Burke*, 334 U.S. 728, 731 (1948); *see also*, *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3102 (1990); *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). Moreover, a federal court may not dispute or second-guess a state court's interpretation of its own law. *Clemons v. Mississippi*, ___ U.S. ___, 110 S.Ct. 1441, 1447-1448 (1990); *Lewis v. Jeffers*, 110 S.Ct. at 3102. A petitioner who is unable to demonstrate that a specific constitutional right has been violated may nevertheless be entitled to relief if his trial was "so fundamentally unfair as to deny him due process." *Donnelly v. DeCristoforo*, 416 U.S. 637, 645 (1974). The Court has emphasized that the Due Process Clause has "limited operation," and that "fundamental fairness" is "very narrowly" drawn. *Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668, 674 (1990). It has not, however, formulated a specific test for determining when the

fairness of a trial has been so compromised as to violate due process. We offer such a test in Argument II.

The opinion of the Ninth Circuit in this case demonstrates a fundamental misunderstanding of the limits which this Court has placed on federal habeas corpus jurisdiction. Not only did the court create it own version of state law, one completely at odds with the state courts' interpretation, it relied on the Federal Rules of Evidence to justify its holding. In addition, the court's discussion of battered child syndrome is inconsistent with every other court which has considered that condition, including another panel of the Ninth Circuit. Its holding could seriously affect state prosecutions of child abuse homicide such as this one. The Ninth Circuit's holding that a jury instruction was improper is also incorrect under state law.

B. The Ninth Circuit Erred In Holding That Evidence Of Prior Injuries Was Inadmissible To Support A Diagnosis Of Battered Child Syndrome

1. The Federal Court Misinterpreted State Law

The state trial court allowed the prosecutor to introduce expert testimony that Tori was a victim of battered child syndrome.[8/] Dr. Levine, who treated Tori

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8. The term "battered child syndrome" was created in Kempe et al., *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962). *See* McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L.Rev. 1, 4, n. 5 (1975).

in the emergency room, testified outside the presence of the jury that battered child diagnosis is a "routine part" of pediatric training. RT 17. Although physical injury which cannot be explained by the reported history is an important consideration, RT 19, no "single piece of evidence" is sufficient to establish the battered child syndrome. RT 22. After extensive argument, J.A. 1-20, the trial allowed Dr. Levine and Dr. Hermann, the pathologist, to give their opinions on whether Tori was a battered child. In support of their diagnosis, the witnesses could discuss the injuries sustained by the victim at the time of her death, the earlier damage to her ribs and anus, and the inconsistent explanation offered by respondent to the police. J.A. 17-20. The trial court excluded, however, any reference to sociological risk factors associated with battered children. J.A. 17.

In addition to testimony about battered child syndrome by the physicians, the prosecution introduced evidence of prior assaultive behavior against Mrs. McGuire by respondent, and statements by Mrs. McGuire to a neighbor that respondent had beaten her. RT 463-465, 467-469. The latter testimony was offered specifically to impeach Mrs. McGuire's testimony that respondent never hit her and that she was not afraid of him. RT 468. There was also testimony of two incidents when respondent manhandled his daughter. On one occasion he pinched her cheeks and forced food in her mouth while feeding the baby; later the same day her

face showed bruises where he had grabbed her. RT 469-470, 475-476. Another time respondent dragged the child by one arm to the car. RT 488-489. Tori was no more than five- to six-months old at the time of these incidents.

On state appeal, respondent argued that the prior injuries were improperly admitted because they were not specifically tied to him. The California Court of Appeal rejected this claim. It held that the prior injuries were admissible as tending to establish the battered child syndrome diagnosis. J.A. 45-47. In support of its conclusion the court relied upon three California cases, *Landeros v. Flood*, 17 Cal.3d 399, 131 Cal.Rptr. 69 (1976); *People v. Bledsoe*, 36 Cal.3d 236, 203 Cal.Rptr. 450 (1984); *People v. Jackson*, 18 Cal.App.3d 504, 95 Cal.Rptr. 919 (1971).[9/] It is clear from these decisions that battered child syndrome is a well accepted diagnosis in California courts and that evidence of prior injuries which tend to support the diagnosis is admissible. In *Jackson*, the "seminal case" on this subject, *State v. McKowen*, 447 N.W.2d 547, 549 (Iowa App. 1989), the court noted that a finding of battered child syndrome is simply a determination that the child's injuries were not inflicted by accident; it is not an opinion that any particular person "has done anything." 18 Cal.App.3d at 507, 95 Cal.Rptr. at 221. "The additional finding that the injuries were

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9. *Jackson* and *Landeros* were cited to and discussed by the state trial court during arguments on the admissibility of the battered child evidence. J.A. 7-9, 17-20.

probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason." *Id.*

The Ninth Circuit simply ignored the state appellate and trial court decisions in deciding that the prior injury evidence, specifically the broken ribs and lacerated anus, was inadmissible. The court first concluded, in partial reliance upon the Federal Rules of Evidence, that the other injuries were irrelevant and thus not probative because they were not specifically connected to respondent. 902 F.2d at 753. Despite evidence that respondent was "rough"[10/] with Tori in the past, the court found those acts were insufficient to permit the jury to infer that he also caused the rib and anal injuries. *Id.*, at 753-754. Again citing to the Federal Rules, the Ninth Circuit emphasized its view that the prior *injuries* were inadmissible as respondent's prior *bad acts*, in effect equating the actual injuries with the prior mistreatment. *Id.*, at 754.

Next, the Ninth Circuit concluded that the prior injuries were introduced "to establish that [respondent] was a child abuser, and for no other purpose, in a murder trial for the death of his child." *Id.* The injuries were

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10. The Ninth Circuit's description of respondent's behavior as "rough" is misleading. Respondent grabbed the baby's face while feeding her with sufficient force to leave bruises. Another time he picked up the infant and carried her to the car by one arm. Handling a five- or six-month old child like a sack of potatoes is more than "petty meanness." 902 F.2d at 753. It is brutal.

"incorrectly admitted . . . pursuant to California law" to prove battered child syndrome. According to the Ninth Circuit's understanding of state law -- an understanding at odds with the state courts -- such evidence is admissible solely to demonstrate that the present injuries did not occur accidentally and in this case "no claim was made that the child died accidentally." *Id.* The court cited *People v. Jackson*, 18 Cal.App.3d at 504, 95 Cal.Rptr. at 919 and *Landeros v. Flood*, 17 Cal.3d at 399, 131 Cal.Rptr. at 69, the same cases relied upon by the state courts, to support its conclusion about the scope of California law on battered child syndrome. Based on its own reformulation of the state trial record and of state law, the Ninth Circuit concluded that petitioner was prejudiced by admission of the prior injuries. *Id.* The court's holding is incorrect for a variety of reasons, all of which reflect a misunderstanding of, or disregard for, its habeas corpus jurisdiction.

In *Clemons v. Mississippi*, 110 S.Ct. at 1447-1448, this Court emphasized that a federal court has no authority to dispute a state court's interpretation of its own law. It made the point again in *Lewis v. Jeffers*, 110 S.Ct. at 3102-3103 (reversing Ninth Circuit's independent review of Arizona state law determination). *See also*, *Gryger v. Burke*, 334 U.S. at 731. The Ninth Circuit simply ignored these limitations.

Although California state law on the use of battered child syndrome has been settled for twenty years

and was specifically applied by the state courts in this case, the Ninth Circuit concluded that the evidence was "incorrectly admitted" under state law. 902 F.2d at 754. Incredibly, it did so by attaching its own meaning to the principal state cases with no discussion of the state appellate court's contrary holding. In light of *Clemons* and *Jeffers* the Ninth Circuit was bound by the state courts' conclusion that evidence of battered child syndrome, and use of the prior injuries to support it, was proper under state law.

2. The California Rule on Use of Battered Child Syndrome is Constitutional

In determining that the state court relied on an incorrect evidentiary theory, the Ninth Circuit cited to Rule 404(b) of the Federal Rules of Evidence. However, the rules are not constitutionally based. *Dowling v. United States*, 110 S.Ct. at 674. Thus a violation of those rules, or their principles, cannot alone constitute a federal constitutional violation since they only "govern the treatment of evidentiary questions in federal courts." *Bourjaily v. United States*, 483 U.S. 171, 177 (1987); *see*, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1160-1161 (7th Cir. 1987) (Ripple, J., concurring) (habeas corpus was properly denied, but court should not rely on the Federal Rules of Evidence when evaluating a challenge to a state court conviction). By citing to the rules and forwarding its own

view of state law, the Ninth Circuit attempts to impose over state courts a supervisory authority which it does not possess. *Smith v. Phillips*, 455 U.S. at 221.

As troubling as the court's reinterpretation of state law may be, the Ninth Circuit's woeful misunderstanding of battered child syndrome testimony may be the most pernicious and troubling aspect of its holding. The court concluded that battered child syndrome is admissible only if the defendant raises accident as a defense. Since the prior injuries were admitted solely to negate that defense, and were not specifically connected to respondent, and because respondent did not claim Tori's death was accidental, the Ninth Circuit held that the evidence was irrelevant and thus inadmissible. The court was wrong for several reasons.

"Child abuse is maddingly difficult to prove. . . . Often the only evidence is the bruised and battered body of a little child." Myers & Carter, *Proof of Physical Child Abuse*, 53 Mo. L.Rev. 189 (1988) [Myers]. Battered child syndrome is one method of bridging that evidentiary gap. "Unbeknownst to the perpetrator, abuse often leaves an indictment etched in human flesh." *Id.*, at 201.

Battered child syndrome is "a clinical condition in young children who have received serious physical abuse . . . ." Kempe et al, *The Battered-Child Syndrome*, 181 J.A.M.A. 17, 24 (1962) [Kempe]. It is a medical diagnosis based on an expert's observation of a child's

battered body. As such, the diagnosis does not depend upon evidence of the defendant's conduct toward the child, or on proof of the defendant's character. Myers, at 193. "A marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered-child syndrome." Kempe, at 18. "[A] lame excuse cast[s] a shadow of suspicion over the defendant." Myers, at 223. The syndrome is not exclusive to any particular economic or social group. McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 Minn. L.Rev. 1, 16 (1965); Kempe, at 18.

"Battered child syndrome is well accepted by medical science . . . ." Myers, at 203. More importantly, it is well accepted by the courts. "[A]ll courts which have considered the question" have upheld the admissibility of battered child evidence. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905, 912 (1978).[11] *See, e.g., Bell v. State*, 435 So.2d 772, 776 (Ala.Crim.App. 1983); *State v. Mayer*, 151 Ariz.App. 253, 727 P.2d 31, 33 (1986); *State v. Dumlao*, 3 Conn.App. 607, 491 A.2d 404, 409 (1985); *State v. Tanner*, 675 P.2d 539, 543 (Utah 1983); *State v. Toennis*, 52 Wash.App. 176, 758 P.2d 539, 545 (1988).

Experts on battered child syndrome do not offer an opinion on whether any particular person committed

11. The majority of the cases dealing with battered child syndrome rely in part on the California Court of Appeal's decision in *People v. Jackson*, 18 Cal.App.3d at 504, 95 Cal.Rptr. at 919.

the crime, but testify solely on whether the victim's injuries could have been caused by accident. *See, e.g., State v. Mayer*, 727 P.2d at 33; *State v. Dumlao*, 491 A.2d at 410; *State v. McKowen*, 447 N.W.2d at 548-549; *State v. Wilkerson*, 247 S.E.2d at 911. Where the child is unable to testify, such expert testimony is "clearly relevant to the issue of the cause of the injuries." As such it is "highly probative" and any prejudice is outweighed by its probative value. *State v. Mayer*, 727 P.2d at 33; *see also, State v. McKowen*, 447 N.W.2d at 549 (battered child evidence is "highly relevant"); *People v. Barnard*, 93 Mich.App. 590, 286 N.W.2d 870, 871 (1979) (battered child syndrome is "highly relevant to the material issues of intent and nonaccident"); *State v. Tanner*, 675 P.2d at 543 (rejecting argument that prior injuries are more prejudicial than probative). That the victim, like Tori, has died, "strengthens, rather than diminishes, the law's concern for the special problems of prosecuting a defendant in a 'battered child' case." *Schleret v. State*, 311 N.W.2d 843, 844 (Minn. 1981). Evidence of other injuries introduced in support of the battered child diagnosis does not depend upon connecting the defendant to infliction of those injuries. The syndrome is "independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidentally, injured on the day in question." *Bludsworth v. State*, 98 Nev. 289, 646 P.2d 558, 559 (1982).

A diagnosis of battered child syndrome is often indicated when the "child's injuries do not jibe with the history given by the parents." *State v. Dumlao*, 491 A.2d at 409. Indeed, the discrepancies between the parent or caretaker's version of what happened and the nature of the injuries is crucial. Experts are generally allowed to explain why the proffered explanation is not reasonable. *See, e.g., Schleret v. State*, 311 N.W.2d at 845; *State v. Holland*, 346 N.W.2d 302, 307-308 (S.D. 1984); *State v. Tanner*, 675 P.2d at 544; *see also*, Myers, at 194, 222. "The expert opinion that the victim was a battered child, coupled with some additional proof, has been held sufficient to permit a jury to conclude that the child's injury occurred 'at the culpable hands of its parents.'" *Bludsworth v. State*, 646 P.2d at 559. Courts have held that the only additional proof necessary to support a conviction is the defendant's sole custody of the child. *See, e.g., State v. Dumlao*, 491 A.2d at 410; *People v. Henson*, 33 N.Y.2d 63, 349 N.Y.S.2d 657, 665-666 (1973). These cases are certainly consistent with this Court's recognition that pieces of evidence cannot be viewed in isolation. "The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. at 179-180.

Federal courts have allowed the admission of battered child syndrome and the evidence of other injuries and inconsistent explanation offered to support it. *United States v. Boise*, 916 F.2d 497 (9th Cir. 1990); *United States v. Leight*, 818 F.2d 1297 (7th Cir. 1987); *United States v. Bowers*, 660 F.2d 527, 529 (5th Cir. Unit B 1981) (battered child evidence coupled with proof of sole custody will support a conviction). Other courts have generally recognized the difficulty of proving child abuse cases and the need to rely upon evidence of prior injuries. *United States v. Harris*, 661 F.2d 138 (10th Cir. 1981); *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973). The Due Process Clause of the Fourteenth Amendment "cannot possibly require more of a state court system" than is required of federal courts. *Smith v. Phillips*, 455 U.S. at 218. It is equally true that the federal courts cannot preclude state courts from using the same relevant and highly probative evidence which they allow in federal prosecutions.

The above cases demonstrate the flaws in the Ninth Circuit's analysis of respondent's trial. The battered child syndrome diagnosis was relevant to establish that Tori's death was not accidental. Her prior injuries, regardless of whether they were connected to respondent, and respondent's incredible claim that she was injured in a fall from the couch, whether or not he explicitly offered an accident defense at trial[12/], were admissible to support

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12. The Ninth Circuit's conclusion that accident was not a defense is misguided. Although defense counsel argued that Mrs. McGuire was the killer, she also contended that "[n]o matter who hit Tori, . . . [i]t was an involuntary manslaughter at most." RT 718. Because defense counsel reserved her opening statement, RT 12, the prosecutor did not know her theory of the case and could

the battered child diagnosis. The uncontradicted evidence that Tori was a battered child and the concession that she was in respondent's exclusive custody shortly before her death fully debunk the Ninth Circuit's view of the evidence as the "barest threads," 902 F.2d at 755, or "mere shadows of guilt." *Id.*, at 756. The state's case was, as the dissent from denial of rehearing en banc suggested, "very strong indeed," 919 F.2d at 583, if not overwhelming. Under the circumstances no basis appears for concluding that respondent's state court trial was so fundamentally unfair as to require a reversal based on denial of his due process rights. In the absence of a federal constitutional violation, the Ninth Circuit had no authority to reverse respondent's conviction.[13/]

Moreover, the Ninth Circuit's opinion could seriously undermine the ability of states to effectively prosecute child abusers and cases of child abuse murder. "Since 1985, the number of reported child abuse fatalities has increased over 38%." The National Center on Child Abuse Prevention Research, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual*

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only assume that it would be consistent with respondent's earlier statement. More importantly, he was not aware until Mrs. McGuire took the stand that she would accept blame for Tori's death.

13. The result in this case demonstrates how the doctrines of due process and fundamental fairness can be manipulated to reverse a state conviction with which the federal habeas court disagrees despite the absence of any specific federal constitutional violation. In Argument II we suggest a means for curbing such abuse.

Fifty State Survey, p. 15 (March 1990) [Current Trends]. In 1989, 1,237 child abuse fatalities were reported, a 3% increase over the previous year. *Id.*, at p. 14. Particularly disturbing is the age of these victims. In the fifteen states which provided data on age, over 50% were less than one at the time of death. *Id.*, at p. 16. Forty-eight children were murdered by a parent or caretaker in Los Angeles County in 1989. Los Angeles Times (November 14, 1990) at page 1A, column 2. In Chicago there were 41 child abuse homicides. Chicago Tribune (May 20, 1990) at page 1. New York reported 187 such fatalities. Current Trends, at p. 14.

Battered child syndrome was developed as a tool for identifying the victims of child abuse. The courts have recognized its reliability and probative value, when combined with other evidence, to convict the perpetrators of such offenses. "While the legal system cannot guarantee children a safe and nurturing environment in which to live and grow, the law helps stem the tide of abuse." Myers, at 225. The Ninth Circuit's threat to the continued use of battered child syndrome is without constitutional underpinnings and should be reversed.

C. **The Ninth Circuit Erred By Holding That A Jury Instruction Denied Respondent A Fundamentally Fair Trial.**

The jury in respondent's state trial was instructed on its limited consideration of other crimes evidence as follows:

> "Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> "1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
>
> "2. To establish the battered child syndrome, and
>
> "3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

> "For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose." J.A. 40-41.

Lengthy discussions and arguments preceeded the trial court's decision to give the instruction. J.A. 21-39. Although respondent challenged the instruction in his direct appeal, the California Court of Appeal did not reach that issue. The District Court rejected a similar challenge in its order denying respondent's habeas corpus petition. J.A. 61-65.

The Ninth Circuit, focusing solely on subsection 3, concluded that the instruction denied respondent a fundamentally fair trial. Specifically, the court found that the instruction improperly "informed the jury that it may find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses." 902 F.2d at 755. It also concluded that the instruction was based on an "incorrect reading" of standardized state jury instructions. *Id.*, at 755, n. 2.[14/] Once again the Ninth Circuit ignored the limits of its habeas corpus jurisdiction.

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14. The fact that the state has changed its standardized instructions says nothing about the constitutional validity of the earlier version. The modified pattern instruction is an issue of state law outside the scope of the Ninth Circuit's habeas corpus authority.

This Court has strictly limited the authority of federal courts to reverse state criminal convictions based on the jury instructions. It is not enough to show that an instruction was "undesirable, erroneous, or even 'universally condemned.'" Rather, the question is whether the instruction "by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). That a particular instruction may be prohibited in federal prosecutions is not alone sufficient to establish that its use in a state prosecution violated the Due Process Clause of the Fourteenth Amendment. *Cupp*, at 146. More importantly, judges are not free in defining due process to impose "'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

The Ninth Circuit concluded that subdivision 3 of the instruction allowed the jury to use evidence of prior acts as improper character evidence. The significance of that section, however, can only be evaluated by comparison with the evidence in the case, the rest of that instruction, and the other instructions as a whole. *Henderson v. Kibbe*, 431 U.S. at 156. The Ninth Circuit did not undertake such an analysis.

Three types of "similar act" evidence were admitted at trial: (1) Tori's prior injuries (broken ribs and

torn anus); (2) physical assaults on respondent's wife; and (3) mistreatment of Tori by respondent (rough handling while feeding Tori and carrying her by one arm to the car). The prior injuries were specifically admissible to support the battered child syndrome diagnosis. The assaults on his wife impeached her testimony that respondent never hit Mrs. McGuire and that she was not afraid of him. The prior brutal treatment of respondent's infant daughter was admitted without objection or limitation. RT 469-471, 475-476, 488-489. During the conference on instructions the prosecutor argued, over defense counsel's objection, that respondent's handling of Tori should be considered as evidence of other acts tending to prove identity and intent. J.A. 23-24, 28-31. The trial court gave the instruction after reviewing the record for any limitations on the evidence demonstrating respondent's prior handling of the child. J.A. 31, 37-38. When the other acts instruction is viewed as a whole, in light of the other instructions and evidence in the case, there is no reasonable likelihood that the jurors misunderstood the limitations of the evidence or misapplied it. *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1198 (1990). Even if the instruction was imprecise or allowed an improper inference to be drawn, it did not render the trial as a whole fundamentally unfair.[15]

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15. As noted by the judges who dissented from denial of en banc review, the jury deliberated three days and had several portions of the record reread, including a great deal of Mrs. McGuire's

Presumption instructions which implicate a defendant's right to be convicted only upon proof beyond a reasonable doubt, *see, e.g.*, *Rose v. Clark*, 478 U.S. 570 (1986), or instructions which incorrectly define an element of the offense, *see, e.g.*, *Pope v. Illinois*, 481 U.S. 497 (1987), are properly subject to a harmless error analysis. Although the Ninth Circuit concluded that the instruction in this case violated due process and was not harmless beyond a reasonable doubt, citing *Chapman v. California*, 386 U.S. 18 (1967), that test was inappropriate. The instruction here dealt solely with the manner in which the jury could use certain evidence *under state law*. As such its validity cannot be separated from the admissibility of the evidence itself. Because, as discussed above, the evidence was properly admitted for the purposes described in the instruction, the instruction could have violated respondent's constitutional rights only if it rendered the trial fundamentally unfair. As set forth in more detail at Argument II, the test for fundamental fairness is less demanding than harmless error analysis under *Chapman*. It is certainly inappropriate to apply *both* fundamental fairness and harmless error analysis to the same claim.

The Ninth Circuit allowed its own interpretation of state law, misunderstanding of battered child syndrome, and dissatisfaction with respondent's conviction in light of

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testimony. "This jury was clearly not inflamed by passion." 919 F.2d at 584.

Daisy McGuire's immunity to override the limitations of its habeas corpus jurisdiction. Because his due process rights under the Fourteenth Amendment were not violated, respondent was not entitled to relief on federal habeas corpus.

II.
RESPONDENT RECEIVED A FUNDAMENTALLY FAIR TRIAL BECAUSE NO REASONABLE PROBABILITY EXISTS THAT EXCLUSION OF THE BATTERED CHILD EVIDENCE WOULD HAVE RESULTED IN A DIFFERENT VERDICT.

In *Sumner v. Mata*, 449 U.S. 539 (1981), this Court identified the question presented as "whether the Court of Appeals properly analyzed respondent's challenge to his state-court murder conviction, given the limited nature of the review provided federal courts by 28 U.S.C. § 2254." *Id.*, at 541; *see also, e.g., Demosthenes v. Baal*, ___ U.S. ___, 110 S.Ct. 2223 (1990); *Rushen v. Spain*, 464 U.S. 114 (1983); *Cupp v. Naughten*, 414 U.S. at 141. Ten years later the Court must again decide the appropriate scope of federal habeas corpus. We submit that the time has come to place a more specific limitation on a dual system of collateral review "that no other democracy deems necessary." Powell, *Capital Punishment*, 102 Harv. L.Rev. 1035, 1041 (1989) [Powell].

Establishing the boundaries of federal habeas corpus relief has engaged much of this Court's time and engendered countless scholarly discussions. The Court has not "always followed an unwavering line in its conclusions as to the availability" of habeas corpus relief. The law in this area "has been attended, seemingly, with some backing and filling." *Fay v. Noia*, 372 U.S. 391, 411-412 (1963). Various lines of authority have "not been without

historical uncertainties and changes of direction . . . ." *Wainwright v. Sykes*, 433 U.S. at 81. The Court has demonstrated, however, an "historic willingness to overturn or modify its earlier views of the scope of the writ . . . ." *Id.*

"Federal habeas corpus has been a source of friction between state and federal courts . . . ." *Sumner v. Mata*, 449 U.S. at 550. The resentment towards federal judges by state judges which habeas corpus review has created is "not healthy or wholesome," Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323, 327 (1971), nor is it theoretical. *See*, *People v. Miller*, 85 Cal.App.3d 194, 198-199, 149 Cal.Rptr. 204, 206 (1978) (characterizing district court order, based on recommendation of federal magistrate, to either recall remittitur and consider search issue or release defendant, as "an affront to the judges of the courts of this state"); *see also*, Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L.Rev. 423, 439 (1961) (acknowledging the author's negative feelings as New Jersey Supreme Court justice when convictions affirmed by the state court were reversed on federal habeas corpus).

This resentment is premised in part on the assumption of some who support expanded federal review that state courts are incapable of adequately protecting a criminal defendant's constitutional rights. *See, e.g.*, Neuborne, *The Myth of Parity*, 90 Harv. L.Rev. 1105

(1977) (contending that federal judging is superior to state judging in part because federal judges have better law clerks, federal judges exhibit "elan and a sense of mission," and federal judges come from a better socioeducational class); *Coleman v. McCormick*, 874 F.2d 1280, 1295 and n. 8 (9th Cir. 1989) (Reinhardt, J., concurring) (suggesting that state courts are unwilling or unable to vindicate federal rights). There is, however, no intrinsic reason for accepting the notion that federal courts are automatically more competent than state courts to fairly consider and resolve issues relating to federal constitutional rights. *See generally*, Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L.Rev. 441, 507-514 (1963) [Bator]. This Court has expressly rejected the notion that state judges lack "appropriate sensitivity to constitutional rights." *Stone v. Powell*, 428 U.S. 465, 493-494, n. 35 (1976); *see also*, *Swain v. Pressley*, 430 U.S. 372, 383 (1977) (noting "the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues . . . ."). More importantly, the Court has expressly recognized in cases such as *Clemons v. Mississippi*, 110 S.Ct. at 1441 and *Lewis v. Jeffers*, 110 S.Ct. at 3092, that state courts are better equipped than their federal counterparts to interpret and apply state rules of evidence and procedure. "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990).[16] Extensive second-guessing of state court decisions by federal habeas courts can only diminish the sensitivity of state courts toward constitutional rights. McGowan, *The View from an Inferior Court*, 19 San Diego L.Rev. 659, 668-669 (1982). The objective of a bifurcated judicial system should be "to make both the federal and state court systems, strong, independent, and viable." O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 Wm. & Mary L.Rev. 801, 814 (1981).

Widespread and expansive use of federal habeas corpus also "degrades the prominence of the trial itself." *Engle v. Isaac*, 456 U.S. at 127. The view of the state trial as the "'main event,'" *Wainwright v. Sykes*, 433 U.S. at 90, is substantially diminished when a federal court on habeas corpus can reconsider and overrule all aspects of the state procedure including, as the Ninth Circuit did in this case, evidentiary rulings on issues of state law. This is particularly troublesome when the federal court can point to no specific constitutional violation, but must rely instead on its own notions of fundamental fairness and due process.

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16. In *Michelson v. United States*, 335 U.S. 469 (1948), Justice Frankfurter assumed that federal district court judges possess "a high standard of professional competence, good sense, fairness and courage . . . ." *Id.*, at 487-488 (Frankfurter, J., concurring). There is no reason to assume that state court judges lack these qualities.

A criminal defendant is denied due process by a trial court's "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). When attempting to define fundamental fairness, however, "constitutional line drawing . . . is necessarily imprecise." *Donnelly v. DeCristoforo*, 416 U.S. at 645. As a result, federal courts use a variety of formulations to describe the circumstances necessary to establish that the state trial was unfair. *See, e.g., Edwards v. Butler*, 882 F.2d 160, 164 (5th Cir. 1989) (state evidentiary ruling must be "sufficiently egregious" to render trial fundamentally unfair); *Dudley v. Duckworth*, 854 F.2d 967, 970 (7th Cir. 1988) (erroneous ruling must be "'of such magnitude'" that result is denial of fundamental fairness); *Berrisford v. Wood*, 826 F.2d 747, 749 (8th Cir. 1987) (issue is whether error of state law was "so grossly or conspicuously prejudicial that it fatally infected the trial"); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (state procedure must be contrary to "general notions of fairness"); *Bisaccia v. Attorney General of the State of New Jersey*, 623 F.2d 307, 312 (3d Cir. 1980) (use of evidence was "sufficiently unfair so as to raise the spectre of unconstitutionality"); *id.*, at 313 (errors "exceeded the tolerable level of ordinary trial error as to amount to a denial of constitutional due process"). In this case the Ninth Circuit simply decided that respondent's trial was "arbitrary and fundamentally unfair." 902 F.2d at 753.

Moreover, the federal courts often review state convictions using standards better suited to the supervision of federal trial courts than a test for constitutional error. *See, e.g., Hopkinson v. Shillinger*, 866 F.2d 1185, 1197 (10th Cir. 1989) (admission of other crimes evidence will be upheld unless probative value is greatly outweighed by prejudice); *Woodruff v. Lane*, 818 F.2d 1369, 1373 (7th Cir. 1987) (weighing probative and prejudicial value in deciding whether state evidentiary ruling was correct); *Dres v. Compoy*, 784 F.2d 996, 998 (9th Cir. 1986) (evidentiary rulings of state courts are reviewed for abuse of discretion [relying on cases involving direct review of a federal conviction]); *United States ex rel. Durso v. Pate*, 426 F.2d 1083, 1086 (7th Cir. 1970) (holding that review of state court evidentiary rulings for abuse of discretion "must parallel" the test used on direct review of a federal trial court conviction). In effect, federal habeas corpus is converted from an extraordinary means of redressing an unjust incarceration, *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-258 (1973) (Powell, J., concurring), into a second or third appeal of the state conviction. *See, e.g., Dudley v. Duckworth*, 854 F.2d at 970-972 (Court of Appeals "reluctantly" disagreed with Indiana Supreme Court analysis of evidentiary issue based on state cases not cited in the state court's opinion); *Cooper v. Sowders*, 837 F.2d 284, 287-288 (6th Cir. 1988) (characterizing the Kentucky Supreme Court as the "lower court[]" and reversing in reliance on dissenting opinion in the state court). The

result is a substantial diminution in the state's "strong interest in preserving the finality of judgments," *Henderson v. Kibbe*, 431 U.S. at 154, n. 13; *see generally*, Bator at 444-453, and "hardly inspires confidence in our criminal justice system." Powell, at 1041.

A petition for writ of habeas corpus is not, as some have suggested, equivalent to an appeal of state court rulings to the inferior federal courts. *See*, *Anderson v. Butler*, 886 F.2d 111, 113 (5th Cir. 1989) (habeas corpus now functions "in a manner not wholly dissimilar from appeals to the inferior federal courts of state rulings on federal issues in state criminal cases"); Friedman, *A Tale of Two Habeas*, 73 Minn. L.Rev. 247 (1988). Nor should it be, for such an argument "is premised on a skepticism of state courts" which this Court has "decline[d] to endorse." *Sawyer v. Smith*, 110 S.Ct. at 2831. A petitioner who collaterally attacks his criminal conviction "must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982); *Engle v. Isaac*, 456 U.S. at 135-136; *see also*, *Henderson v. Kibbe*, 431 U.S. at 154.

Although this Court has necessarily been imprecise in its definition of fundamental fairness, it has emphasized that alleged due process violations are not reviewed under a harmless error analysis. *Darden v. Wainwright*, 477 U.S. 168, 183, n. 15 (1986). Rather, the question of error subsumes the question of prejudice. If the defendant's trial was fundamentally unfair, he was

necessarily prejudiced and is thus entitled to a new trial. Similarly, even if errors occurred, if the trial as a whole was fair, the conviction should be affirmed. *See*, *United States v. Agurs*, 427 U.S. 97, 112-113 (1976). While the fundamental fairness inquiry under the Due Process Clause is less "demanding" than the harmless-error standard of *Chapman*, *Greer v. Miller*, 483 U.S. 756, 765, n. 7 (1987), the Court has yet to state a test for determining when due process has been violated. Recent decisions suggest an appropriate formulation.

The Court has emphasized that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Thus, the Court's "cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." *Teague v. Lane*, 489 U.S. at 313 (plurality); *see, e.g.*, *Murray v. Carrier*, 477 U.S. 478 (1986) (a showing of factual innocence may allow review of an otherwise defaulted claim); *Strickland v. Washington*, 466 U.S. 668 (1984) (a defendant is prejudiced by ineffective counsel only if the attorney's actions undermine the reliability of the judgment); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-874 (1982) (deportation of potential defense witnesses will not violate due process unless there is a reasonable likelihood that the witness could have affected the judgment of the trier of fact); *Manson v. Brathwaite*,

432 U.S. 98 (1977) (a suggestive identification procedure will not violate due process unless the identification is unreliable); *United States v. Agurs*, 427 U.S. at 112 (the materiality of evidence which prosecution should have disclosed must reflect the Court's "overriding concern with the justice of the finding of guilt").

Based upon its concern for the reliability of the trial, the Court developed a test for determining the materiality of evidence which should have been disclosed by the prosecutor pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Such evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (Blackman, J.; White, J., concurring in part and concurring in the judgment); *accord*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). Because a claim of fundamental fairness is based upon the same concerns for the reliability and accuracy of the trial, the *Bagley* test should apply. Thus, a defendant in a state criminal trial is not denied fundamental fairness due to the admission of irrelevant, inflammatory evidence unless a reasonable probability appears that exclusion would have produced a more favorable result. *See*, *Moore v. Illinois*, 408 U.S. 786,

799-800 (1972).[17] When considered under this test, respondent's trial was fundamentally fair.

Even without evidence of the broken ribs and lacerated anus or the diagnosis of battered child syndrome, the medical evidence was overwhelming that Tori was intentionally killed and that she died very soon after the fatal injuries were inflicted. It is undisputed that respondent had exclusive custody shortly before she died. His explanation for her injuries, given to the nurse and his wife at the hospital and to the police on several occasions, was incredible; a sixteen-inch fall from a couch onto a carpeted floor could not have caused Tori's massive internal damage.

Respondent's confrontation with his wife in the hospital waiting room is particularly significant, although the Ninth Circuit gave it short shrift. After asking respondent several times what "really" happened and being given the same answer, Mrs. McGuire told respondent that he was "responsible" for the baby's condition. Respondent did not answer her. RT 179. Based on this

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17. The Court has declared that a state court's misapplication of state law does not violate the Fourteenth Amendment unless the misapplication is arbitrary or discriminatory. *Beck v. Washinton*, 309 U.S. 541, 554-555 (1969); *see also Engle v. Isaac*, 456 U.S. at 121, n.21. Since *Engle*, this Court's focus apparently has shifted from the arbitrariness of state judicial action to its impact upon the individual defendant. However, a state court that admits irrelevant and inflammatory evidence arguably acts in an arbitrary manner. In that sense, the approaches of *Beck v. Washington* and *Moore v. Illinois* are not entirely divergent.

testimony, the jury was properly instructed under state law that it could infer from respondent's failure to respond that Mrs. McGuire's accusation was true. RT 758-759. As the judges who dissented from rehearing en banc noted, "[t]his conversation makes no sense at all unless it was the father who abused the baby." 919 F.2d at 583. Moreover, it is impossible to conclude from this record that Daisy McGuire was sophisticated or clever enough to stage the conversation in order to later divert attention from her own guilt.

In addition, Mrs. McGuire's attempt to take the blame was inconsistent with the medical testimony and her own earlier statements and testimony. She and respondent were still living together and she discussed her testimony with respondent's attorney but refused to meet with the police or prosecutor. The jury was allowed to infer respondent's consciousness of guilt from this evidence, if it found that he had attempted to procure false or fabricated testimony from his wife. RT 752-753.

Evidence from Mrs. McGuire's statements to the police showed that Tori had been bruised on other occasions. She told the police that petitioner also took care of the infant and that he had no explanation when Mrs. McGuire asked him about the bruises. RT 371. When she asked whether her husband would hurt Tori, Mrs. McGuire replied, "I can't say . . . ." RT 372, 374.

In its first opinion the Ninth Circuit concluded, "Only the father and mother had access to the baby. One

or the other, or perhaps both, are responsible for the death." 873 F.2d at 1327; J.A. 82. Although the court executed a rhetorical retreat in its subsequent opinion, noting that "only the barest threads" connected respondent to the murder, 902 F.2d at 755, the simple fact is that only one of two people could have killed Tori. Given the evidence, confidence in the outcome is not undermined by admission of the battered child syndrome evidence or by use of the limiting instruction, even if it is assumed that both the evidence and the instruction violated state law. Because there is no reasonable probability of a different result, respondent was not deprived of his right to a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment.[18]

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18. Unlike cases in which the Court has remanded for the purpose of undertaking a harmless error analysis, here we contend that no federal constitutional rights were violated. If the Court agrees, no further proceedings are necessary in the Ninth Circuit.

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed.

DATED: April 9, 1991.

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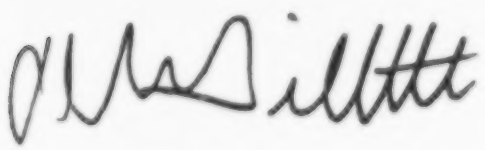

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QUESTION PRESENTED

Was there a denial of due process of law under the Constitution of the United States when evidence of prior injuries to the victim were admitted without evidence linking Respondent to the prior injuries and the jury was instructed to use that evidence to convict him?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1074

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

MARK OWEN MCGUIRE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This is a simple case. A murder case. The McGuires brought their lifeless baby to Kaiser Hospital in Hayward at 9:00 p.m. on July 7, 1981. The doctors called the police because, based on the presenting injuries, the admitting physician, Dr. Levine, determined that this was a battered child case.

The police knew that they had a dead baby and only two suspects, the mother and the father. The police lied to the McGuires, and had the hospital lie to the McGuires about the baby's condition, leading the McGuires to believe that their child was still alive. Daisy and Mark McGuire were taken to the police station and questioned at length by a homicide detective, Robert Gillis. Nevertheless, the police took the position that they did not

"know" it was a homicide, because the autopsy had not yet been performed.

At the end of each interview the police told Mark and Daisy that their child, Tori, was dead. Each parent, listed as a suspect in the consent, consented to search of their home and to additional interviews, still without the benefit of an admonition of rights. The statement relied upon so heavily by the prosecution, that McGuire said "maybe, some Mexicans came in," was never revealed to the McGuires or their attorney until Police Officer Lapic was on the stand. That statement was obtained during the purportedly consensual search, prior to the taking of the scrupulously edited post-admonition version.

The autopsy confirmed the emergency room findings. The injuries are catalogued in detail. Although the dissent of The Honorable Alex Kozinski to the Order denying rehearing (the "Dissent") states that the baby "most likely died within minutes of having been beaten" (JA 132), Dr. Levine opined that, based on their color, the bruises were "at least" one hour old (RT 96). It is undisputed that the baby was beaten to death. Additionally, post-autopsy x-rays showed rib fractures, unseen by either the coroner, Dr. Hermann, or the admitting physician, Dr. Levine. The rib fractures were not used to diagnose Battered Child Syndrome ("BCS") (RT 136, 171, 172). In her motion *in limine* to exclude reference to prior injuries, defense counsel directed the courts' attention to the fact that the rib fractures were unknown at the time of the diagnosis of BCS.

Dr. Levine stated that the BCS could be proven by the nature of the injuries at the time of death (RT 94). Dr. Levine referred to the evidence of prior rib injuries as "confirmation" of that diagnosis (RT 92). All three doctors testified that there was no way the baby could have accidentally received the injuries resulting in her death. Analogies were made. She could not have hurt

herself, even wielding baseball bat (RT 131). She could not have received the injuries in a fall from 16 inches or 16 feet, according to Dr. Hermann (RT 141). No defense experts or other testimony contradicted the medical testimony. No other explanations were offered by the defense.

The briefs and the Dissent argue that McGuire raised the defense of accident and that the Ninth Circuit Panel misunderstood the issue of intent. (SG-24, PB-29, n. 12, JA 124, n. 4)[1] The panel makes no reference to intent. Intent to kill is always at issue in a murder case. The question is whether the jury can be instructed to connect intent and identity to prior injuries without linking the prior injuries to McGuire. The trial court deleted reference to intent and identity in the errant instruction, but permitted the connection to be made by the jury. Trial counsel strenuously argued against the jury instruction permitting use of the prior "offenses" to establish intent (RT 562). Use of the prior injuries to establish intent or identity, without linking those injuries to McGuire, is improper and extraordinarily prejudicial.

McGuire's statement to police was introduced to enable the prosecutor to impeach McGuire's own statements within it, where he said he was non-violent. Counsel for defendant strenuously objected (RT 227-239, 272-285). The court ruled that certain matters were "admissions of facts" (RT 284), and the "admission" was then used to permit introduction of credibility evidence. Though McGuire objected that admission of facts with no reference to penal interest was not a proper hearsay exception, the court stated that the Court of Appeal could correct the error (RT 285).

Even though McGuire admitted slapping Daisy in his statement, the prosecutor used character evidence to im-

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[1] SG refers to the Solicitor General's amicus brief, PB refers to Petitioner's Brief, JA refers to the joint appendix, CJLF refers to the amicus brief from the Criminal Justice Legal Foundation.

peach McGuire's statement in the purportedly consensual interview that he was not a violent person. The sole purpose of using the rank hearsay statement to the police was to create a character issue. The prosecutor argued that the modality of violence identified McGuire as the killer (JA 26).

As a result, McGuire was on trial for his propensity for violence, rather than for whether he committed the murder of his baby. The prosecutor insisted that character evidence was proper, arguing that, "His violent propensity with respect to the family setting within which this crime occurred are germane to show he and not Daisy is the aggressor" (RT 237).

Once McGuire's "non-violent" statement was admitted, the prosecutor brought witnesses to bolster the violent propensity theory. The prosecutor then stated that the statement was not admitted to prove his violence, but to "prove him a liar ultimately" (RT 240).

The first character witness called by the prosecution was Daisy McGuire, who testified under a grant of transactional immunity. This immunity was granted at the preliminary hearing. When she and Mark were questioned by the police after bringing Tori to the hospital, Daisy denied having hit Tori. She was not under oath and did not know Tori was dead. In fact, the police had told her Tori was alive. When she appeared at the preliminary hearing, she refused to testify on the grounds of self-incrimination under the Fifth Amendment of the United States Constitution. The prosecutor made no effort to determine what her testimony would have been before granting immunity, and never asked her at the preliminary hearing whether she hit Tori. Daisy McGuire surprised the prosecutor on the stand at trial and testified that she beat the baby. She said that she did not volunteer the information at the preliminary hearing because she was afraid of giving birth in jail (RT 386).

On the date of Tori's death, Daisy was only gone from the apartment for 5 to 10 minutes. This was confirmed, not only by Daisy but by a neighbor, Mr. Curtis Treadway (RT 543) and the landlady, Mrs. Cox (RT 557-8).

Daisy is characterized throughout the trial as passive (RT 213). Yet she herself testified that she took Mark's keys and threw them in the swimming pool causing him to lose his job (RT 441). Mr. Wood, a neighbor, witnessed and confirmed this altercation (RT 530).

Daisy testified that when she told the police she had not hit the baby, it was before she knew the baby was dead (RT 451, 428). She testified that she did not tell anyone that she hit the baby before because she was afraid (RT 429), she did not want to deliver her second baby in jail (RT 386) and she was not asked whether she had hit the baby at the preliminary hearing wherein she was granted transactional immunity (RT 428). She testified at trial that she had beaten the baby just prior to Mark's arrival at the house (RT 423, 425). She said that she was pregnant and vomiting, the child was sick and crying, the TV was broken, the weather was hot, she was angry at her husband. She hit the baby until the baby stopped crying (RT 422).

The rest of the prosecution witnesses, including Mrs. Short, were brought in to counter Daisy's exculpatory testimony by establishing McGuire's violent propensity.

Mrs. Short testified that she saw McGuire force feed Tori, and that afterward, she saw bruises on Tori's face and on another occasion she saw McGuire carry Tori by one arm for approximately 10-15 feet to his car. She then became confused, stating on re-cross that she had seen McGuire carry Tori to the car by one arm, but Daisy had told her McGuire pinched Tori's cheeks (RT 490). Those *acts*, carrying the baby by one arm and force-feeding her were the only acts regarding Tori that were.

in fact, tied to McGuire.[2] They were admitted for the purpose of impeaching Daisy. Mrs. Short witnessed violence against Daisy.

The trial court admitted McGuire's statement regarding his non-violence for the sole purpose of permitting the prosecutor to impeach it. The trial court admitted the child's prior injuries, including the rib fractures and lacerated anus, for the purpose of establishing the diagnosis of BCS. Evidence of McGuire's violence against Daisy was admitted to impeach her testimony that she was not afraid of him. Diane Short's testimony about rough treatment and Alan Lindner's testimony about early toilet training and swimming were admitted to rebut Daisy's testimony that it was in fact she who had beaten the child. When it came time to instruct the jury regarding the use of this evidence, the court permitted everything to be placed in one instruction, characterized as "other offenses."

The instruction stated:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a clear connection between the other two offense[s] and the one of which the Defendant is

[2] Force feeding and carrying the baby by one arm are characterized as "brutal" by the petitioner (Pet. 22, n.10). Without further engaging in the semantic battle, these acts are not murderous.

> accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider evidence for any other purpose. (J.A. 40-41).

Intriguingly, petitioner argues that there is no likelihood that the jurors misunderstood the limitations of the evidence or misapplied it, even if it was imprecise or allowed improper inference to be drawn (PB 35). Intriguing, because in the long and winding history of this case's ascent to the United States Supreme Court, this is the first time petitioner has recognized that *all* the assaults and injuries were part and parcel of the instruction.[3]

Petitioner concedes that the California Court of Appeal did not even address the instruction issue[4] (PB 33). The federal district court held that the instruction was vague, and "the offenses" defined within it unclear, but that, in context, it "can only mean to refer the jury to the prior injuries to the baby, not to the slapping and rough handling incidents." The federal district court therefore, found no prejudice. (JA 62-63, note 1.) Since it is now conceded that the instruction referred to all the prior injuries and incidents of violence, the negative pregnant of the district court finding clearly indicates prejudice.

[3] Initially petitioner objected that the issue of wife beating and mistreatment of the baby other than prior injuries could not be raised. (Appellee's Ninth Circuit Brief page 8, note 2.) Even Petitioner could not see initially that all these matters were included in one jury instruction with directions to the jury to connect the character evidence to McGuire for a finding of guilt.

[4] Petition for rehearing to the California Court of Appeal was filed requesting the court to address the errant instruction.

The Ninth Circuit panel twice found error in the use of the prior injury evidence, coupled with the errant instruction. After the first opinion, petitioner requested rehearing on the grounds that the court *overlooked federal authority* recognizing the admissibility of the BCS (JA 90). The panel, one year later, wrote a new opinion, leaving out previous discussions regarding the grant of immunity to Daisy and discussing the distinction between *McGuire* and the federal authorities relied upon by petitioner (JA 113). Petitioner sought another rehearing, this time on the grounds that the there was now *too much reliance* on the previously ignored *federal authority* and that the federal court was acting as a super state Supreme Court (PR II, 9).[5] Rehearing *en banc* was denied, but Ninth Circuit Judges Kozinski and Trott, not on the hearing panel, dissented based on their perception that the federal court was unnecessarily inserting its opinion on state law evidentiary matters (JA 117).

This Court granted *certiorari* to review the question of whether the Ninth Circuit exceeded its *habeas corpus* jurisdiction by finding a federal due process violation arising from a state trial court evidentiary ruling which the state Appellate Court found to be correct as a matter of state law.

SUMMARY OF ARGUMENT

Mark McGuire was denied due process and a fundamentally fair trial when the prior injuries to the baby were introduced, over objection, for the purpose of proving BCS. The trial court was wrongly persuaded that the cases permitting prior injuries to prove BCS did not require any analysis for prejudice or admissibility. In fact, the California and federal cases have permitted introduction of BCS evidence of prior injuries *only* for limited purposes.

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[5] PR II refers to the second Petition for Rehearing, filed after the second opinion in May 1990.

The first purpose for introduction of prior injuries in BCS cases is when the charging statute permits or requires proof of a continuing course of conduct. An example of such a statute is the California child abuse statute. When it is indeterminable whether the cause of death or injury is the result of a human agency, expert testimony can tie the prior injuries to the present injury to rebut any defense of illness or accident. There was no question that the death herein was the result of human agency.

Other cases permit introduction of the prior injuries to address some other matter actually at issue such as murder by torture, neglect or long-term abuse and its consequences. None of those events were charged or alleged. It was error to prove the charge of murder on a time and date certain with prior injuries unrelated to the charge and unrelated to the defendant. The error was exacerbated by the instruction to the jury that it could tie the unproven prior injuries to other incidents of violence to make the connection to the murder charge at issue herein.

This was prejudicial error, depriving McGuire of a fair trial. It removed the crucial issues of intent and identity from jury consideration, and permitted the jury to connect other acts of misconduct to McGuire without proof.

The instruction at issue was a CALJIC instruction modified by the trial court on the use of similars. Similars *must* be tied to the defendant to be used for intent or identity. There was *nothing* linking Mark McGuire to the healing rib fractures or anal tearing which happened to the baby. He had worked full-time until the weeks just prior to the baby's death. His treatment of his wife, force-feeding the baby or carrying her by one arm are not similar enough either to the prior injuries or to the charged crime to permit such a connection for the purpose of establishing intent and identity.

Intent is always at issue in a murder case. Intent and identity are essential elements of the crime of murder. To permit the jury to establish such salient elements without tying the prior injuries to McGuire in any meaningful way denies fundamental fairness under any test, including the test proposed by petitioner.

Petitioner concedes that state prisoners are entitled to a fundamentally fair trial under the United States Constitution as applied to the states through the Fourteenth Amendment Due Process Clause.

Requiring due process of law is not a new rule. There is United States Supreme Court precedent requiring the states to follow their own procedural rules. State procedural rules must comply with the United States Constitution. Instructions to the jury to implement those rules must also comport with due process requirements.

Additionally, petitioner and its *amici* seem to suggest a rule of universal admissibility of prior injuries in battered child cases, regardless of the charged crime, the nature of the injuries, the connection with the defendant or the nature of the defense. The result of such a rule is anathema to their stated position—a universal rule of inclusion of evidence imposed upon the states by the United States Supreme Court.

A foreseeable consequence of such a rule could be a vehicular homicide case where a parent fails to strap a child into a car seat. Prior injuries to the child of an unknown source could be discovered and used to establish intent to kill by the driver. Such an absurd result must not be sanctioned by this Supreme Court.

The Fifth Amendment to the United States Constitution provides to all citizens the right to trial by jury. If the instructions given eliminate an essential element of proof from the jury's consideration, due process is denied. No deprivation of liberty may be sanctioned without due process of law.

The introduction of evidence of injuries of unknown origin, coupled with an instruction establishing the connection between the injuries and the murder, removed the burden from the prosecutor. He was no longer required to prove either intent or identity beyond reasonable doubt, and respondent was thereby deprived of due process of law.

The Ninth Circuit Court of Appeals correctly reversed the conviction. The decision reversing the denial of Petition for Writ of *Habeas Corpus* should be upheld.

Petitioner argues that the Ninth Circuit opinion converts fundamental fairness into a code of evidence for state criminal trials and requests that this Court define and limit the reach of federal *habeas corpus* review of state convictions. Petitioner suggests a test for determining when state law error has denied the defendant a fundamentally fair trial and due process, conceding that state prisoners are entitled to a fundamentally fair trial under the United States Constitution as applied to the states by the Fourteenth Amendment Due Process Clause. It is argued, though, that McGuire did receive a fair trial, and that the federal court misinterpreted and may not review the state law.

Both the SG and the CJLF Amicus Briefs have set forth their own questions presented. This Court stated in 1954 that "We disapprove the practice of smuggling additional questions into a case after we have granted certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954).

Amici Curiae are not entitled to present additional questions. *Supreme Court Practice*, Stern, Robert L.; Gressman, Eugene; Shapiro, Stephen M., 6th Ed. (1986), page 571.[6]

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[6] *See, Bell v. Wolfish*, 441 U.S. 520, 532, n.13 (1979) wherein Justice Rehnquist refused to address the question raised in an amicus brief by the NAACP Legal Defense Fund "because the

In an abundance of caution, the questions presented in the *amicus* briefs will be briefly addressed.

The Criminal Justice Legal Foundation narrows this entire dispute to a relevance question, then claims that any rule that permits a federal court to overturn a state question of admissibility of evidence on the grounds of relevance would be a new rule under *Teague v. Lane*, 489 U.S. 288 (1989) (CJLF 3).

The Solicitor General concentrates on whether the introduction of the medical evidence of prior injuries in a child abuse case violates due process in the absence of direct evidence that the defendant inflicted the prior injuries.

Biblical references notwithstanding (CJLF 21), there is Supreme Court precedent requiring states to follow their own procedural rules, and to implement those rules with instructions to the jury which comply with known procedural rules. These are not amorphous or general. Just because the Constitution does not mention the presumption of innocence or the requirement that guilt be proved beyond a reasonable doubt does not mean that a shifting burden is not Constitutional error. This is particularly true when the shifting burden is not the result of a legislative enactment but is based on trial court error in admission and instruction. A person may not be deprived of liberty without due process. An accused has the right to a trial by an impartial jury and to be informed of the nature and cause of the accusation. These Sixth Amendment rights underlie the fair trial guaranteed to state prisoners through the Fourteenth Amendment.

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argument was neither presented to or passed on by the lower courts; nor have they been urged by either party in this court. Accordingly, we have no occasion to reach them in this case." C.f., *United Parcel Service v. Mitchell*, 451 U.S. 56, 60, n. 2 (1981); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

There must be something to tie the prior injuries to the murder charge. The Ninth Circuit panel was correct in reversing this conviction. The errors made regarding admission of evidence and the instruction denied McGuire a fair trial.

ARGUMENT

I. THE NINTH CIRCUIT PANEL DID NOT EXCEED HABEAS JURISDICTION

A. The Federal Court Must Reverse The Conviction When Confinement Violates the Constitution Of The United States

Petitioner argues that the Ninth Circuit exceeded its jurisdiction by ordering the lower court to grant the Petition for Writ of Habeas Corpus in this action.

Petitioner's argument is based on a failure of logic. The argument is based on the premise that the federal court cannot overturn a state evidentiary ruling based on state law (PB 19). In fact, this Court can and must overturn a conviction based on admission of evidence and concomitant jury instruction which violates the Constitution of the United States (28 U.S.C. § 2254).

The Ninth Circuit said that without the injuries and the instruction, "only the barest threads connect McGuire to the crime" (JA 113).

The Dissent characterizes the evidence of guilt as overwhelming (JA 118). Without analysis of connection between McGuire and the injuries, the Dissent states, "A finding that evidence is inadmisisble to prove Battered Child Syndrome says nothing about whether the evidence may be admitted for the broader purpose of showing prior bad acts" (JA 127, fn. 5). As will be shown, however, prior acts are inadmissible without proof that McGuire is connected to the prior acts.

Much is made of the conversation overheard in the emergency room between the parents. With rampant

speculation, the Dissent contends that the emergency room conversation, wherein McGuire said in response to Daisy's questions that he "didn't know" what happened, and failed to respond when Daisy said, "you are responsible," made no sense unless McGuire abused the baby (JA 130).

"Biblical history of Pontius Pilate's condemnation of Jesus, as well as human experience, has taught us that silence or an equivocal reply in the face of an accusatory statement is not always indicative of a consciousness of guilt." *People v. Spencer*, 78 Cal.App.2d 652, 656 (1947); *People v. Simmons*, 28 Cal.2d 699, 713-714 (1946); Matt. Chap. 27, v. 11-14; 3 Wigmore on Evidence § 1072, pp. 84-85.

The Dissent speculation is capped with the remarkable conclusion that this double hearsay interpretation could be exceeded in reliability only by a "videotape of the crime" (JA 130).

In a state action, when inadmissible evidence is accompanied by a constitutionally erroneous, burden-shifting instruction, *habeas corpus* is proper. *Yates v. Evatt*, —— U.S. ——, 91 Daily Journal D.A.R. 6160, 6161-6162 (May 29, 1991). In *Yates*, this court twice ordered the South Carolina Supreme Court to release the petitioner. On the first remand, the state court ignored this court's mandate; on the second, it found harmless error. Such an error, being of constitutional magnitude, is not harmless. *Yates* was not a retroactive application of a new rule of law, no longer cognizable on habeas under *Teague v. Lane*, *supra*; *Sawyer v. Smith*, —— U.S. ——, 110 S.Ct. 2822, 2823 (1991).

The errors in *McGuire* are constitutionally similar to those in *Yates*, and have long been recognized as unconstitutional.

The evidence of prior injuries to Tori McGuire was initially admitted for the limited purpose of establishing BCS, that is, to show that the injuries were not accidentally inflicted (JA 519).

The prosecutor, when asking for admission of injuries and testimony regarding BCS stated, "We do not maintain that the BCS addresses itself to the identity of the perpetrator. We maintain it as a diagnostic devi[c]e period" (JA 16).

Defense counsel argued that the prior injuries should not be admitted under Cal. Evid. Code § 1101(b), the equivalent of Fed. Rules of Evid. 404(b), which forbids character evidence, or Cal. Evid. Code § 352(a), which forbids evidence which is more prejudicial than probative (JA 18). The trial court herein failed to weigh the evidence under any standard before admitting it.

When the time came to formulate the instruction limiting the use of "similars" evidence, CALJIC 2.50, the prosecutor argued that Cal. Evid. Code § 1101(b) had no application, because this is a battered child case (JA 34). Contrary to his earlier statement that the BCS was merely a diagnostic device, not for identification, he now maintained that the injuries "were to infer and connect" McGuire to the homicide (JA 34). When McGuire argued that it was necessary to connect McGuire to the prior offenses in order to use them against him, the prosecutor argued that, "Some facts do double duty, obviously" (JA 37). In other words, there was no need to prove that McGuire committed the prior injuries in order to use them to connect him to the murder by way of identity and implied intent.

The Court lumped all prior injuries together. The rib fractures and anal tearing were referred to as "prior injuries" together with the one-arm carrying and force-feeding. Defense counsel argued,

> First of all, we discussed in chambers . . . that all, just grouping all prior injuries, I certainly understand that to come in for . . . limited purposes. . . . So, the fact that I didn't object when he asked something about the bruises should not allow him to get

> that in for some other purposes. They came in for those two limited purposes (JA 29).

The trial court clarified that the two limited purposes were impeachment and to establish battered child syndrome (JA 30). The prosecutor argued, "If it is admissible, it is admissible" (JA 29).

The trial court initially admitted the evidence for limited purpose, conceded to by the prosecutor, but then permitted the jury to use the prior injuries to identify McGuire as the perpetrator of all the injuries and connect him to those injuries where *no* evidence was established about time, place or manner. There was *no* evidence that McGuire was present at the time the prior injuries were inflicted, or even that he had access to the child during the time-frame. No specific evidence was introduced about the time frame of the infliction of the prior injuries occurred. (Compare, *United States v. Boise*, 916 Fed.2d 497, 501 (9th Cir. 1990).)

The recently established standard requires that this Court review the jury instructions to determine the "reasonable probability" that the verdict rested on an unconstitutional ground. *Boyde v. California*, —— U.S. ——, 110 S.Ct. 1190, 1198 (1990).

It is an essential corollary of our reasonable doubt standard in criminal proceedings that a conviction, capital or otherwise, cannot stand if the jury's verdict *could* have rested on unconstitutional grounds. *Stromberg v. California*, 283 U.S. 359, 367-368 (1931). "A conviction ought not rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). Of course, this instruction was *not* an equivocal direction. It was an unequivocally wrong statement of the law. The evidence was improperly admitted, without analysis, initially for limited purpose. The Court then gave a "limiting" instruction telling the jury that it could connect prior injuries with prior witnessed acts of

violence against both McGuire's wife and against his baby in order to find him guilty of murder.

"[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 552, 563-564 (1967). Use of prior offenses in a state case does not by itself violate due process.

> The defendants' interests are protected by limiting instructions . . . and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence.

Spencer v. Texas, 385 U.S., at 561.

When, as here, no limiting instruction confining the evidence to its proper function was given, introduction of prior crimes evidence is violative of the Due Process Clause. The rule which forbids the introduction of evidence of other offenses is not a mere technical rule of law. "It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence." *Spencer v. Texas, supra*, 385 U.S., at 574, fn. 5 (Warren, C.J. and Fortas, J., concurring).

Chief Justice Warren went on to state,

> Recognition of the prejudicial effect of prior conviction evidence has traditionally been related to the requirement that the state prove beyond a reasonable doubt the commission of a specific criminal act.

Spencer v. Texas, supra, 385 U.S., at 575.

Clearly, the limiting instructions were considered to be the saving grace of the use of prior convictions under the Texas statute. Notably, the procedure employed at the trial herein, where evidence was admitted for a limited purpose and the jury was instructed to connect the prior offenses to the offense charged, was not a California procedure authorized by statute.

The instructions herein were so confusing that even the courts and attorneys who have considered them have not been clear what they related to. The California Court of Appeal refused to address them at all. The Federal District Court thought they related only to the prior injuries to the baby, not to the slapping and rough handling incidents (JA 62-63, fn. 1). Although Petitioner now concedes that the instruction referred to all the prior incidents of violence, it has taken many years of briefing to reach that point. How the jury could be expected to understand an instruction so confusing that experienced attorneys and courts could not understand it is incomprehensible.

The principles of presumption of innocence and proof beyond a reasonable doubt, as well as rules against the use of unrestricted propensity evidence, are deeply rooted in American jurisprudence. "Due process prevents state action which offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Screws v. United States*, 325 U.S. 91, 95 (1945). In *Screws*, the court found dual error, including instructional error, albeit in a federal case, on its own motion. 325 U.S. 107. While the Constitution of the United States does not specifically state the presumption of innocence, it is undeniably a foundation of U.S. criminal law. *In re Winship*, 397 U.S. 358, 364 (1970). Any suggestion that federal courts cannot correct deprivation of a fair trial by a state committing evidentiary error and permitting burden-shifting jury instructions because there is no link to a particularly delineated specific guaranty of the Bill of Rights is therefore in error (SG 12, CJLF 19).

Justice Oliver Wendell Holmes characterized the right of state prisoners to apply to federal courts for constitutional protection as perhaps the most important guaranty of the Federal Constitution.

> When the decision of the question of fact is so interwoven with the question of constitutional right that the one necessarily involves the other, the federal court must examine the facts.

Frank v. Mangum, 237 U.S. 309, 347 (1914) (Holmes, J. Dissenting).

The Solicitor General argues that the plea of not guilty required the government to disprove any accident defense, whether or not actually presented, by means of prior injuries and direction to the jury to connect them to McGuire without any evidence (SG 24).

While urging the court to look at the whole trial, it is suggested that the jury instruction should be "viewed without distortion . . . of the admissibility of the evidence in question" (SG 25). This really cannot be done. Disconnecting character evidence from the court's instruction on how to use it violates due process. See, *Spencer v. Texas, supra*, 385 U.S., at 561.

Petitioner argues that the opinion of the Ninth Circuit demonstrates a fundamental misunderstanding of the limits which this Court has placed on federal *habeas corpus* jurisdiction (PB 19). This is not true. Understanding its limits, the Court found a due process violation, and reversed the conviction based on violations of the United States Constitution. The fact that a trial court errs and the state appellate court fails to consider the error must *not* prevent federal courts from determining Constitutional violations.

B. Principles of Comity Are Protected

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* charged. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (emphasis in original). The offense charged herein was murder on July 7, 1981. It was not neglect or long-term abuse jus-

tifying reference to prior injuries. It was not based upon an accident defense, where the actus reus is admitted, but the intent to kill is denied. See, E. Imwinkelreid, *Uncharged Misconduct Evidence*, Chapter 4 (1984).[7]

Petitioner and *amici* argue that the evidence was admitted under state law and reviewed by a state court, and that the federal courts may not simply review rules of state evidence. This does not mean federal courts may not review state decisions. The Due Process Clause requires evaluation based on disinterested inquiry. Forcible extraction of stomach contents by the government, for example, is "too close to the rack and the screw" to permit constitutional differentiation. *Rochin v. California*, 342 U.S. 165, 172 (1945). The federal courts and the federal constitution must be available for review of state criminal convictions. The fact is that the state appellate court herein failed and refused to review the erroneous jury instruction which made the wrongful admission of evidence even more harmful and prejudicial. If the state court fails to follow its own rules of due process and precedent by permitting unproven prior acts to be considered "similars" for the purpose of instructing the jury, it offends fundamental principles of justice. *Speiser v. Randall*, 357 U.S. 513, 523-524 (1958).

It should be noted that the position taken by petitioner's *amici* is certainly not a new position. In dissenting against *Griffin v. California*, wherein this Court held that California's rule permitting comment to the jury on a defendant's Fifth Amendment refusal to testify was unconstitutional, Justices Stewart and White stated that the Fourteenth Amendment did not "of its own force forbid . . . comment on a defendant's failure to testify." *Griffin v.*

[7] Though both amicus briefs cite Imwinkelreid as authority on prior misconduct evidence, both ignore Chapter 4 which specifically addresses Battered Child Syndrome and specifically discusses the necessity for similarity between the prior acts and the charged crime.

California, 380 U.S. 608, 619 (1965). There has been no suggestion by this court that it will not apply the guarantees of the Bill of Rights to the citizens of the states. This court has expressed a preference for protection of victims of child abuse. The protection of that public policy interest must be balanced against evidentiary limitations that will encourage accurate finding of facts upon which a citizen's incarceration are based. *Maryland v. Craig*, —— U.S. —— 110 S.Ct. 3157, 3165 (1990).

The prosecutor's actions against McGuire were inimical to accurate fact finding. No facts whatsoever were presented regarding the prior injuries to the baby. "[S]imilar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Dowling v. United States*, —— U.S. ——, 110 S.Ct. 668, 671 (1990).

In *Dowling*, this court held that the facts underlying a prior acquittal could be used in a subsequent robbery trial. In *McGuire*, there are *no facts* connecting the prior injuries to McGuire. The injuries were introduced initially only for the purpose of confirming the BCS. As a result, McGuire had no opportunity to "litigate" the facts of the prior injuries before they were used, by means of the jury instruction, to shift the burden of proof from the prosecution. The introduction of such evidence under these circumstances is so unfair that it violates "fundamental conceptions of justice." *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. *Wainwright v. Goode*, 464 U.S. 78, 86 (1983). The adoption of a state rule cannot foreclose inquiry as to whether the application of the rule results in deprivation of due process. *Lisenba v. California*, 314 U.S. 219 (1941).

Prior bad acts may not be used to prove intent unless the commission of the acts by the defendant himself is proven beyond a reasonable doubt. *United States v. Hadley*, 918 F.2d 848, 850 (9th Cir. 1990). This is a mixed question of law and fact because there is no question of the fact of the prior injuries. The factual question is how they occurred, and the legal question is whether the fact of their occurrence can be used against McGuire. There is no presumption of correctness of the factual and legal question presented, because no analysis was made by the trial court of either the factual or the legal basis for admission of the prior injuries against McGuire. *Sumner v. Mata*, 455 U.S. 591, 597 (1982); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980).

This is not a case where the federal court is "peering majestically over the state court's shoulder." *Lewis v. Jeffers*, —— U.S. ——, 110 S.Ct. 3092, 3102 (1990). The presumption of correctness of a state court hearing does not apply if the *habeas* petitioner demonstrates that the fact finding procedure was not adequate to afford a full and fair hearing, or if the material facts were not adequately developed at the state court hearing. 28 U.S.C. §§ 2254(d)(2) and (d)(3).[8]

Justice Frankfurter stated that "the judicial enforcement of the Due Process Clause is the very antithesis of a Procrustean rule . . . a gradual process of judicial inclusion and exclusion." *Irvine v. California*, 347 U.S. 128, 143 (1954) (Frankfurter, J., dissenting).

The argument is made that state courts need protection from federal intrusion, that state courts are just as able

[8] Even under the proposed changes presently before the Subcommittee on Civil and Constitutional Rights Committee and the Judiciary, U.S. House of Representatives known as the President's Crime Bill, the stated purpose of which is to curb the abuse of habeas corpus by state and federal prisoners, this presumption of correctness requires full and fair determination of the facts and full and fair adjudication of the claim before the state court. Crime Bill § 205, § 2254 amendments.

to resolve questions of Constitutional magnitude as federal courts. This is true. It is also true that *habeas* review by federal courts permits dialogue between the courts and, according to Justice Harlan, forces both the federal and state courts to toe the constitutional mark. Patchel, K., *The New Habeas*, 42 Hastings Law Journal 939, 1028; *Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., concurring).

The facts underlying the prior injuries were not established at all against McGuire. The injuries were admitted, over objection, for the ostensible purpose of overcoming an accident defense. The jury was instructed that even without evidence tying McGuire to the prior injuries, it could use those injuries to infer *his* intent to kill and connect him to the crime by means of other propensity evidence.

This was not due process of law. This was not a fair trial. The state appellate court did not even consider the effect of the instruction on the admission of this evidence. Protection of state prisoners from constitutional error of this magnitude is not a new rule. *Teague v. Lane*, 489 U.S. 288 (1989).

II. STATE AND FEDERAL BATTERED CHILD CASES CASES DO NOT MANDATE ADMISSION OF PRIOR INJURIES WITHOUT ANALYSIS

Ironically, the rule proposed by petitioner and the *amicus curiae* would result in a Supreme Court mandated rule of admissibility of evidence. That is why the question presented by respondent is framed in terms of due process. That is not a question of admissibility of evidence. It is a question of constitutional magnitude when evidence is incorrectly admitted for one purpose, the BCS, and the jury is instructed to use the evidence to establish McGuire as the killer. The BCS is admissible in state and federal courts; however, the trial court must analyze the evidence to be introduced to prove the BCS

in order to determine whether the evidence of prior injuries to the baby can be tied to some issue in the case.

A. Case Survey—California

The BCS diagnnosis was initially approved under the *Frye* test of admissibility in California by the Court of Appeal in *People v. Jackson*, 18 Cal.App.3d 504 (1971). The court in *People v. Jackson* admitted evidence of a series of injuries to a child against parents charged under the child abuse statute, Cal. Pen. Code § 273a. It was all of the injuries which resulted in the diagnosis of the BCS. The parents presented a defense of denial and an opposing medical expert. The distinguishing fact regarding *People v. Jackson* is that the court held that prior injuries, and all of them, were necessary to prove the charge of child abuse. On the contrary, the medical experts testifying against McGuire did not need the prior injuries to prove that this child was battered.

The BCS was then approved by the California Supreme Court as a medical diagnosis. *Landeros v. Flood*, 17 Cal.3d 399 (1976). The California Supreme Court recognized in this civil medical malpractice case that the BCS was an accepted medical diagnosis and cited authority from other jurisdictions; *People v. Henson*, 33 N.Y.2d 63 (1973); *State v. Loss*, 295 Minn. 271 (1973).

The leading article relied on by the trial court in this case and in most other battered child cases is the article by Kempe, et al. 181 AMAJ 17, 18, which states that "to the informed physician, the bones tell a story the child is too young or too frightened to tell." Today legislative protections have been enacted which require not only doctors but child care workers and teachers to report suspected child abuse. *Cf.* Cal. Pen. Code § 11164, *et seq.* It is undisputed that the BCS is an admissible medical diagnosis. Nonetheless, the evidence used to prove the BCS must be analyzed to determine its admissibility, particularly if it will be doing "double duty" by not

merely overcoming an accident defense, but being used as a "similar other offense" for the purpose of establishing guilt. While the facts and statistics verify the ugliness of child abuse, there is no precedent for a separate rule of admissibility for child abuse cases that is contrary to the rules that apply to other murder cases.

In *People v. Steger*, the California Supreme Court reduced a sentence from first to second degree murder. BCS evidence had been introduced not simply to overcome an accident defense, a proper purpose, but to support a finding of murder by torture under Cal. Pen. Code § 189. *People v. Steger*, 16 Cal.3d 539, 546 (1976). Unlike in *McGuire*, the prior injuries in *Steger* were tied to a matter actually placed at issue by the defendant. The injuries were connected to the stepmother defendant by her confession, were to rebut an accident defense, and to prove murder by torture.

In *People v. Wright*, the California Court of Appeal ruled that the trial court properly admitted evidence of a pattern of child abuse to substantiate Pen. Code § 273a as an underlying crime for felony murder and to rebut the defense of accident presented by both parents in testimony on the stand. *People v. Wright*, 60 Cal.App.3d 6, 13 (1976).

In *Wright* the child's death occurred from peritonitis resulting from bowel rupture caused by continued beatings. The prior injuries were a direct cause of death. *People v. Wright, supra*, 60 Cal.App.3d, at 9.

The issue in this murder case was whether McGuire beat Tori on July 7, 1981, causing her death. In each of the cases cited to the trial court as authority for permitting admission of BCS, as well as in their progeny, BCS was essential to the charge. The continuing course of conduct was part and parcel of the death. In *People v. Ewing*, the court permitted evidence of a continuous course of conduct to prove a violation of Pen. Code § 273a.

The information alleged violation of Pen. Code § 273a by a course of conduct which occurred during a designated six month period. As such, the prior injuries were necessary to prove the charge. The jury was unable to substantiate murder. *People v. Ewing*, 72 Cal.App.3d 714, 717 (1977).

Felony murder was not instructed in *McGuire* because the court found child abuse was an integral part of the homicide, and could not therefore be the subject of a separate offense under *People v. Ireland*, 70 Cal.2d 522, 539 (1970). Pen. Code § 273a (child abuse) was neither charged nor instructed.

In *People v. Shockley*, the defendant mother was charged with two counts of willful cruelty, child endangerment, cruel and inhuman corporal punishment and second degree murder. She had three children, twins and an older child; one of the twins was dead, the other severely malnourished. The cause of death was malnutrition and dehydration. The defendant's course of conduct and the children's prior injuries were essential to prove the charge. *People v. Shockley*, 79 Cal.App.3d 669, 674 (1978).

In *People v. Aeschlimann*, the parents of an abused child were convicted of first degree murder. Neighbors witnessed and testified to the infliction of prior injuries. Further, the court ruled that the testimonial evidence of previous beatings was "not evidence of 'prior acts' within the meaning of Evid. Code § 1101, but was instead evidence of the crime with which defendants were charged: a course of conduct of inflicting grievous pain and suffering that proximately caused Todd's death [murder by torture]." *People v. Aeschlimann*, 28 Cal.App.3d 460, 473 (1972).

In *People v. Atkins*, 53 Cal.App.3d 348, 353 (1975), there were admissions and other testimony linking the prior injuries to the child. The prior injuries, seen by

others, included burns, bites and broken bones. The baby died of peritonitis, and both adults were charged. The man was convicted of second degree murder and the mother of involuntary manslaughter. Once again, the prior injuries were shown to be part and parcel of the death.

On May 3, 1991, a California appellate court disallowed evidence of prenatal drug use in a Pen. Code § 273a fatal child endangerment case because there was no connection between the prenatal drug use and the death. The court detailed the careful scrutiny which must precede evidence of other crimes under California law, which rule was in effect at the time of McGuire's trial.

> It is well settled that "admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, fn. omitted.) Such evidence must be scrutinized carefully. Its admission depends on . . 1) the materiality of fact sought to be proved or disproved, 2) the tendency of the uncharged crime to prove or disprove the material fact, and 3) the existence of any rule or policy requiring the exclusion of relevant evidence. (*Id.*, at p. 315 and fn. 14.)

People v. Moten, 91 Daily Journal, D.A.R. 5272, 5274 (May 3, 1991).

Furthermore, if the probative value is slight and the potential for prejudice great, the evidence should be excluded under Evid. Code § 352. *People v. Turner*, 50 Cal.3d 668, 703-705 (1990).

In conclusion, the California BCS cases do *not* justify admission of the other crimes evidence against McGuire. The injuries were not tied to a material issue and were not analyzed by the trial court for their admissibility. Prior injuries to the baby which took place at an unknown time in an unknown place and were inflicted by

an unknown party cannot be tied to the defendant by means of a complex and erroneous jury instruction without creating prejudicial error, and consequently denying McGuire of his right to due process of law.

B. Case Survey—Federal

The mother in *United States v. Woods* was found guilty of first degree murder in the death of her foster son, Paul. 484 F.2d 127, 129 (4th Cir. 1973). Paul was cyanotic, turning blue and gasping for air on three occasions, and ultimately leading to his death. Mrs. Woods was the only person who had access to the child. The action was tried in federal court because Mr. and Mrs. Woods lived on an army base. The government showed that between 1945 and the date of trial, seven children, including the Woods' three natural children, had died and two others in her care had experienced cyanotic episodes.

The Court held that the evidence of injuries to other children was admissible to prove *corpus delicti*—death by foul means. *United States v. Woods*, 484 F.2d at 132. The remarkable similarity of the deaths and surrounding circumstances among these children, all of whom came in contact with Mrs. Woods, was relevant not as to the propensity of Mrs. Woods to commit other crimes but to show that the unique methods were like a "signature." *Woods*, *supra*, at 133. The court in *Woods* confirmed that use of prior injuries to overcome an accident defense may be "invoked only where an accused admits that he did the acts charged but denies the intent necessary to constitute a crime, or contends that he did the acts accidentally. *McCormick*, p. 450." *Woods*, *supra*, at 134.

In another action, the jury had to decide whether an infant died of abuse, accident or birth trauma. *United States v. Leight*, 818 F.2d 1297, 1299 (7th Cir. 1987). The Court of Appeals ruled that the evidence of child abuse against Mrs. Leight's other children must be

weighed to determine whether 1) the evidence fits within an Evid. Code § 404(b) exception; 2) the probative value outweighs prejudicial effect; and 3) the prior misconduct was proved by clear and convincing evidence. *United States v. Leight*, *supra*, at 1302. The district court carefully weighed the evidence and admitted it to overcome a defense of accident presented by Mrs. Leight. *Id.*, fn. 3.

In *United States v. Harris*, the defendant testified at trial that he never hit the baby, that when he had the baby on his shoulders, he tripped and fell. 661 F.2d 138, 140 (10th Cir. 1981). Other injuries were introduced to rebut the defense of accident. The court followed the rule stated in *United States v. Colvin*, 614 F.2d 44 (5th Cir. 1980) that the prior injuries were admissible because the government had offered "sufficient proof linking the appellant to the prior injuries to meet the threshold test" for admission; and that the pattern of abuse was relevant to overcome an accident defense and to establish intent.

When there is a total failure of showing that the prior injuries were caused by the defendant, the evidence of prior injuries is inadmissible. *United States v. Brown*, 608 F.2d 551 (5th Cir. 1979). In *McGuire*, the trial court totally failed to determine a connection, apparently believing it unnecessary to show a connection between McGuire and the child's prior injuries.

The Solicitor General asks this Court to decide whether the introduction of medical evidence of prior injuries violates due process if there is no direct evidence tying the injuries to the defendant.

This requires, of course, *some* indication that the prior injuries were caused by the defendant. The BCS cases cited to this Court do not permit automatic admission of prior injury evidence. Where, as here, the severity of the beating which caused the death is sufficient in itself to prove that Tori was a battered child, evidence of prior injuries, without a tie to the defendant, are cumulative on the issue of BCS.

Petitioner and *amici* supporting its position argue that because the prosecution has the burden of proof on all issues, a defendant cannot remove an issue from dispute either by stipulation or passivity. (CJLF 5, SG 16, Pet. 30.) It is further argued that the prior injuries are relevant to show intent and identity, and lack of accident, whether or not an accident defense is introduced. Analogies are drawn, for example, to arson (SG 14) and distinguishing bank robbery (SG 18) using the "anonymous intent" argument set forth in Imwinkelreid, § 2.05 to justify use of the prior injury evidence. The source for the arson analogy happens to be a California case. "The other fires are admissible to prove the actus reus of arson even if the proponent of the evidence cannot link the defendant to the other fires." (Imwinkelreid, *Op. Cit.*, § 2:05, Chap. 2, p. 8, fn. 30.)

In that case, a man was charged with burning down the family business. He had twice previously collected insurance payments on arson fires. These other fires, albeit uncharged, were admitted for the purpose of establishing *modus operandi*, a recognized exception to the rule barring character evidence. *People v. Maler*, 23 Cal.App. 3d 973, 977 (1972).

When one crime is charged, it is not relevant that other, similar crimes have taken place unless it can be proven that the act occurred and that defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). The independent relevance cannot be bootstrapped as it was in this case. Here, the prior injuries were admitted initially for the purpose of establishing the BCS; the prosecutor thereafter introduced McGuire's statement, wherein he admitted slapping wife and denied he was a violent person. The prosecutor then called Mrs. McGuire, who said, the first time she was asked under oath, that she beat the baby. Then the wife slapping, arm carrying and force-feeding testimony came in to negate Mrs. McGuire and his statement. The jury was in-

structed that the unspecified "other offenses" could be used to establish a "clear connection" so that if the jury thought that McGuire committed the "other offenses" it could "logically conclude" that "he also committed the the crime charged in this case." The prosecutor argued, when confronted with the problem that evidence was admitted for limited purpose, that "If it is admissible, it is admissible" (JA 29). This use of prior injuries ostensibly to prove BCS and then to bootstrap intent is an impermissible use under any authority, state or federal. The admission of this evidence coupled with the trial court's instruction, denied McGuire due process of law.

III. THE TRIAL COURT'S INSTRUCTION ON THE USE OF OTHER CRIMES EVIDENCE WHEN COMBINED WITH THE ADMISSION OF THE PREJUDICIAL EVIDENCE, VIOLATED MCGUIRE'S RIGHT TO DUE PROCESS

A. The Purported "Limiting Instruction" Actually Allowed Unlimited Use

The trial judge, over extensive defense objections, included a modified version of CALJIC No. 2.50 in his charge to the jury (JA 21-39).

CALJIC No. 2.50 was designed to limit the jury's use of evidence of other offenses. *People v. Rollo*, 20 Cal.3d 109, 122 (1977). However, the instruction read to the jury in this case did not limit the use of evidence of other offenses, but instead urged the jury to maximize the use of this evidence in an extremely prejudicial manner. When combined with the evidence of anal tearing, prior rib fractures, and other unidentified prior offenses deprived McGuire of his right to a fundamentally fair trial under the Due Process Clause of the Fourteenth Amendment.

CALJIC No. 2.50 (1979 Revision) stated, in relevant part:

"Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which he is on trial.

"Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.

"Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

"[A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [the identity of the person who committed the crime, if any, of which the defendant is accused] [a clear connection between the other offense and the one of which defendant is accused so that it may be logically concluded that if defendant committed the other offense[s] he also committed the crime charged in this case] [the corroboration of the testimony of the prosecuting witness];]

"[The existence of the intent which is a necessary element of the crime charged;]

"[The identity of the person who committed the crime, if any, of which the defendant is accused;]

. . . .

"For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

"You are not permitted to consider such evidence for any other purpose." (California Jury Instructions, Criminal, Fourth Edition, 1979, pp. 53-54.)

In order to qualify as a limiting instruction, CALJIC 2.50 must identify the evidence to which it relates. *People v. Rollo, supra*, at 123, fn. 6.

When the version of the CALJIC instruction in effect at the time of trial is compared to the version actually given by the trial judge, the omissions and misstatements are apparent.[9]

The first deviation from CALJIC No. 2.50 was the trial judge's statement, in the first sentence of his instruction, that evidence had been introduced to show that McGuire had committed acts similar to the crime for which he was on trial. This had the effect of removing a critical issue from the jury: whether any of the other offenses was, in fact, similar.

The trial judge exacerbated the problem by leaving out the first bracketed paragraph of CALJIC 2.50, which explains that the evidence, if believed, must be examined to determine if it shows a "characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case." It is *only* after this determination is made that a jury may reach the question of whether there is a clear enough connection between the offenses "that it may be logically concluded that if defendant committed the other offenses he also committed the crime charged. . . ." [10] The bracketing, which is included in the

[9] Amicus curiae, Criminal Justice Legal Foundation, contends that whether the trial judge misread the instruction is "immaterial" because CALJIC is only a recommendation of a committee of the Superior Court of one county (CJLF p. 11, fn.10). This contention unfairly minimizes the importance of standard jury instructions in California state trials and belies a fundamental misunderstanding of the wide use of CALJIC by judges and lawyers. Indeed, judges are specifically encouraged to rely upon CALJIC unless they find that other instructions better state the law. (See California Standards for Judicial Administration, section 5.)

[10] It is clear from the use note accompanying CALJIC No. 2.50 ["In using this instruction, if the first bracketed paragraph on

official version of CALJIC 2.50 is extremely confusing. There is no closing bracket to the first bracketed paragraph until the outside of the semicolon at the end of the paragraph. This indicates grammatically that the first sentence of the paragraph *must* be used if the "clear connection" language used in the *McGuire* trial is used.

The trial judge failed to specify what "other offenses" evidence he was referring to in the instruction. Subsection 3 refers to "two offenses", yet there were more than two offenses discussed in the course of the trial. The jury might properly have concluded that one of the offenses they should consider was evidence regarding McGuire's alleged assaults on his wife.

It is fallacious to argue that the items of evidence referred to in this instruction are, in fact, connected.

The first part, the impeachment of Daisy's testimony that she had no cause to be afraid of appellant, related not to Mark's treatment of the baby, but to his treatment of his wife (RT 463). Ms. Short's account of an incident of violence between husband and wife was disputed by other neighbors; however, the marital strife was linked, in the same instruction, to a statement in Part 3 that "it may logically be concluded that if the defendant committed other offenses, he also committed the crime charged in the case" (RT 756-757).

This permitted the jury to take evidence that appellant slapped his wife and pinched his baby's cheeks to determine that he murdered his child in the five to fifteen minutes it took his wife to walk to a phone booth and back on July 7, 1981 (RT 463, 466-468).

This instruction erroneously indicates that establishing the BCS itself makes a sufficient connection between the

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characteristic method is given use only the applicable inner bracketed purpose clauses . . ."] that the "clear connection" sentence was not intended to be given without the "characteristic method" sentence.

uncharged crimes and the crime charged. There is no authority for this connection.

The trial court's mangling of CALJIC No. 2.50 thwarted the purpose of those instructions by failing to limit the jury's consideration of evidence of uncharged crimes, and violated California law by permitting the jury to make a direct determination of guilt by concluding that McGuire committed other offenses.

B. The History of CALJIC 2.50 Shows The Impropriety of The Trial Court's Version

Although the trial court's erroneous instruction was drawn from part of the language contained in CALJIC and in California case law, the court's wording actually contradicted applicable law and was defeated the limiting purpose of the CALJIC instruction.

The Ninth Circuit, in reversing McGuire's conviction, found that the trial court's instruction told the jury to use the prejudicial evidence "in the most improper way possible," focusing particularly on subsection 3 (JA 110).

Under California law, evidence of an uncharged crime may not be considered by a jury, with some exceptions. *People v. Hill*, 67 Cal.2d 536, 551 (1967); *People v. Valentine*, 207 Cal.App.3d 697, 702 (1988). Exceptions include "similars" evidence, evidence to impeach credibility, and felony conviction of a crime affecting credibility of a testifying defendant. Such evidence is absolutely prohibited to prove the propensity of the defendant to commit crimes. *People v. Morgan*, 87 Cal.App.3d 59, 66 (1978). However, evidence of another crime may be considered if it is relevant to a disputed issue, for example, to prove the existence of a similar motive, scheme, plan, system, guilty knowledge, or intent. Cal. Evid. Code § 1101(b); FRE 404(b); *People v. Hill*, 67 Cal.2d, at 551; *People v. Valentine*, 207 Cal.App.3d at 702; *People v. McCullough*, 158 Cal.App.2d 310, 313 (1958). California law has long required that there be a "clear connection" between the un-

charged and the charged offenses in order for the stated exceptions to apply to a case. *People v. Lane*, 100 Cal. 379, 386 (1893); *People v. Lapin*, 138 Cal.App.2d 251, 258 (1956); *People v. Burke*, 18 Cal.App. 72, 98 (1912). However, no California authority has ever suggested that a jury be instructed that it may take a direct determination of guilt of the charged offense by concluding that the defendant committed an uncharged criminal act based on an unlimited "connection" to the charged offense which the unguided jury may happen to perceive. The trial court here so instructed this jury.

On the contrary, California law requires that a trial court, in reading CALJIC No. 2.50 pursuant to defense request, explicitly itemize for the jury what aspects of an uncharged crime may suggest such a "clear connection" to the charged offense, thereby strictly limiting the issues upon which such evidence is relevant and admissible. *People v. Nottingham*, 172 Cal.App.3d 484, 497 (1985); *People v. Swearington*, 71 Cal.App.3d 935, 949 (1977). The trial court must be precise if it instructs the jury as to the limitations on such evidence, because jurors are otherwise "unskilled and undisciplined in perceiving the limited purpose" for which such evidence may be considered. *People v. Williams*, 11 Cal.App.3d 970, 978 (1970); overruled on another point, *People v. Collie*, 30 Cal.3d 43 (1981); see *People v. Albertson*, 23 Cal.2d 550, 577-578 (1944). CALJIC No. 2.50 was written to serve that purpose.

In conformity with California law, the 1970 Revision of CALJIC No. 2.50 (Third Edition) was written to tell a jury that evidence "tending to show" that the defendant committed uncharged crimes could not be considered to prove that he had "a disposition to commit crimes," but rather could only be considered for the "limited purpose of determining if it tends to show" identity, motive, intent, knowledge, possession, or similar characteristic method, plan, or scheme. The CALJIC Use Note required a trial

judge to delete from the instruction any inapplicable purposes in the serial listing. The jury was to be instructed that it could not consider the evidence "for any other purpose."

Subsequently, the California Court of Appeal, in *People v. Haslouer*, 79 Cal.App.3d 818, 829, fn. 3 (1978), observed that the "common plan" part of CALJIC No. 2.50 "carrie[d] no disclosure of what use the jury may make of common plan once it determines there is one," and suggested that the CALJIC Committee redraft the instruction to explain further the use of such evidence. The suggested revision, adopted by the Committee in its 1979 Revision (Fourth Edition), was written to explain to the jury that, if evidence of uncharged crimes could be considered for the "limited purpose of determining if it tends to show" a similar "characteristic method, plan, or sheme," then the similar "characteristic method, plan, or scheme" could be considered if it further tends to show intent, corroboration of prosecution testimony, or "a clear connection between the other offense and the one of which defendant is accused so that it may be logically concluded that if defendant committed the other offense[s] he also committed the crime charged in this case." It is this "clear connection" language that the trial court in McGuire's case selected, wholly out of its indispensable context, thereby misinstructed his jury.

The Committee revised CALJIC No. 2.50 in 1984 in reaction to the California Supreme Court's opinion in *People v. Tassell*, 36 Cal.3d 77 (1984) and again revised the instruction in response to a 1986 legislative amendment to the California Evidence Code. Comment to CALJIC No. 2.50 (1987 Revision) (Fourth Edition, January 1987 Pocket Part); Note, California Evidence Code, section 1101. The Fifth Edition of CALJIC in 1988 also modified the instruction somewhat. None of the amendments to CALJIC No. 2.50 in any way validated the trial court's instruction to McGuire's jury. In fact, the "clear

connection" language was deleted altogether, apparently as an incidental effect of other alterations.

Thus, none of the various mutations of CALJIC No. 2.50, before or after 1982, would have permitted a trial court to instruct a jury, as the court did in this case, that it could make a direct determination of guilt of the charged offense from evidence that a defendant may have committed other offenses.

Had the trial court carefully utilized the language of CALJIC No. 2.50 and followed the recommendation in the Use Note to tailor the instruction to the relevant uses of the particular evidence, the court's instruction would have been in conformity with California law.[11] The trial court's failure to do so is inexplicable in light of the urging of the California Judicial Council in its Standards for Judicial Administration to use applicable CALJIC instructions, *id.*, at § 5, and the advice of appellate courts to consult the CALJIC Committee's Use Notes to determine whether an instruction requires editing in any given case. *People v. London*, 206 Cal.App.3d 896, 904 (1988); *People v. Haslouer*, 79 Cal.App.3d at 830.

The crazy-quilt, mix and match quality of the instruction left the jury with the mistaken impression that it could use the evidence of prior injuries to the baby, prior fights between the McGuires and force-feeding to prove murder.

Petitioner argues that the rough handling of Tori proved identity and intent (PB 35). The instruction given did not pinpoint the offense. The instruction tied all the evidence together, including the prior injuries,

[11] Respondent is not suggesting that the evidence was appropriately admitted or that a correct reading of CALJIC No. 2.50 would have cured the errors in this case. In fact, had the trial court correctly read and interpreted the law and the instructions, the evidence would not have been classified as "similar" or "other crime" evidence.

domestic disputes and carrying by one arm, and gave the "connecting" instruction without the tie to identity. There is no way that the rough feeding and carrying can be likened to the multiple, organ-smashing blows that killed Tori. The instruction proposed by the defense related directly to the evidence of prior injuries and complied with the actual admission of that evidence. The fractured ribs were not even considered by Dr. Hermann when he made his diagnosis.

C. The Trial Court's Instruction Violated Appellant's Right to Due Process By Removing From the Jury the Determination of Guilt Beyond a Reasonable Doubt

This Court has explicitly held that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In spite of this requirement, petitioner and the Solicitor General argue that, when viewing the instructions as a whole, the instruction on reasonable doubt would somehow "cancel out" any error caused by the conceded conflict between the "clear connection" instruction and reasonable doubt instruction (PB 34-35; SG 26-27). The argument that "there is no reasonable likelihood that the jurors misunderstood the limits of the evidence or misapplied it," is preposterous in light of the misunderstandings, misapplications and misinterpretations which have taken place in the journey of this case to this Court (PB 35).

The Solicitor General argues as follows:

> That instruction states, in a general way, the principle that underlies much similar act evidence. If there is some clear connection between one act and another *evidence that a person committed the first act* may help prove he committed the second (SG 26).

Yes, that is a correct statement of the law. That is the precise error alleged by McGuire and found by the Ninth

Circuit. There was no evidence presented regarding the acts causing the rib and anal injuries to Tori. There was *no* connection between McGuire and those acts which could be used to establish a connection to the homicide charged herein. When compared to the other state and federal child abuse cases, it is *clear* that there is *no* such connection. The evidence did not establish that McGuire was a caregiver at the time those injuries were inflicted. In fact, there was no evidence regarding the time the prior injuries were inflicted. No evidence regarding the circumstances surrounding the prior injuries was received because, initially, they were received for the limited purpose of corroborating the finding of BCS.

By the time counsel for defendant determined that the facts were doing "double duty," not only in establishing BCS, but establishing McGuire's guilt by way of this catch-all instruction, the trial was over (JA 37).

This Court made clear the "constitutional stature" of the reasonable-doubt standard and emphasized its importance in the American scheme of criminal procedure as "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship, supra,* at p. 363.

This constitutional principle "prohibits the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of the crime." *Francis v. Franklin,* 471 U.S. 307 (1985). Convictions based on such presumptions must be overturned. *Sandstrom v. Montana,* 442 U.S. 510 (1979).

The trial court's instruction in this case usurped the duty of the trier of fact to determine guilt beyond a reasonable doubt. This presumption of guilt denied McGuire's right to due process of law. This unconstitutional reduction of the prosecution's burden of proof prejudiced McGuire, thereby necessitating reversal. The standard recently established by this Court for interpreting erro-

neous jury instructions is whether there is a reasonable likelihood that the jury applied this instruction in an unconstitutional way. *Boyde v. California,* —— U.S. ——, 110 S.Ct. 1190, 1198 (1990).

In effect, the trial court's instruction permitted the jury to do something it should not, something prohibited by settled constitutional principles. A reasonable juror could easily interpret the instruction as directing him to convict on very little evidence—evidence which does not meet the constitutionality mandated standard of proof beyond a reasonable doubt.[12]

D. The Unconstitutional Instruction Was Not Harmless Beyond A Reasonable Doubt

Most cases which have addressed the constitutionality of inferences and presumptions have analyzed prejudice pursuant to the *Chapman* standard requires that the error be found harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24; 87 S.Ct. 824, 828 (1967). The due process denial here cannot be deemed harmless beyond a reasonable doubt.

As the Ninth Circuit correctly stated, acts which the prosecution did not connect to appellant cannot be characterized as *his* prior acts (JA 108). McGuire's prior acts vis-a-vis Tori attributed to him by Mrs. Short, but disputed by other neighbors, cannot by any stretch of the imagination be characterized as similar.

In order for those acts to be characterized as similar, the jury would have to make such a finding of a characteristic method, plan or scheme tending to show either the existence of the intent, identity or clear connection between the offenses.

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[12] "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana, supra,* 442 U.S. at p. 514.)

The application of this instruction to the prior injuries to the baby was improper without all the paragraphs and proper distinctions.

The BCS evidence of prior injuries was admitted to rebut any possible accident defense. It was not introduced for the purpose of showing a clear connection between the rib fractures and the murder in order to establish McGuire as the killer.

The jurors in this case were instructed on the general principles of reasonable doubt and the presumption of innocence (CALJIC No. 2.90). They were also told to view the instructions as a whole. (CALJIC No. 1.01). However, these general instructions "do not dissipate the error in the challenged portion of the instructions." *Francis v. Franklin, supra*, 471 U.S. at p. 320 (1965).

It was essential to McGuire's case that the jury be instructed accurately and completely on the use they could make of the other crimes evidence, particularly since McGuire was never tied to these other crimes. There was no instruction that adequately limited the use the jury could make of this evidence. The trial judge's instruction served the opposite purpose, allowing the evidence to be emphasized rather than limited.

Jury instructions convey essential legal principles to jurors otherwise unlearned in the law. "Jurors are not experts in legal principles; to function effectively, and justly, they must be *accurately* instructed in the law." *Carter v. Kentucky*, 450 U.S. 288, 302 (1981) (emphasis added).

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

This jury had bad guidance in an extremely troublesome area, it was prejudicial beyond a reasonable doubt.

CONCLUSION

The admission of character evidence for the purpose of establishing McGuire's propensity to commit crimes and the instruction herein so infected the trial that the conviction denied McGuire due process of law.

Uncharged misconduct cannot be linked to McGuire without proof—and a jury instruction cannot be used to establish that proof.

The jury instruction was an incorrect statement of the law which had the effect of shifting the burden of proof to a standard less than reasonable doubt. The error was of constitutional magnitude and was prejudicial. The Ninth Circuit correctly reversed the conviction. That decision should be affirmed.

Respectfully submitted,

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FILED
JUL 2 1991
OFFICE OF THE CLERK

No. 90-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

MARK OWEN McGUIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

NEITHER THE EVIDENCE OF OTHER INJURIES TO THE MURDER VICTIM AND OF OTHER MISCONDUCT BY RESPONDENT NOR THE JURY INSTRUCTION RELATING TO THAT EVIDENCE DENIED RESPONDENT A FUNDAMENTALLY FAIR TRIAL.

Respondent[1] contends that the evidence of Tori's earlier injuries and respondent's documented brutal

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1. We refer to Respondent's Brief as RB and the amici brief filed on behalf of two defense counsel organizations as Defense Attorneys; we follow respondent's designation of Petitioner's Brief and the amici briefs filed in support of our position. RB at 3, n. 1.

mishandling of the child and abuse of his wife was improperly admitted. He also asserts that the challenged jury instruction allowed the evidence to be used improperly. The amici brief filed in support of respondent argues that evidence of propensity is constitutionally inadmissible, then asserts that the prior injuries and misconduct had no probative value except to demonstrate a propensity towards violence. Both arguments apparently abandon at least one basis for the Ninth Circuit's decision: that is, that the evidence was inadmissible on the issue of Battered Child Syndrome.

A. Admission Of Evidence

In its order reversing respondent's murder conviction, the circuit court concluded that proof of prior injuries to support a diagnosis of Battered Child Syndrome was "incorrectly admitted . . . pursuant to California law . . . ." *McGuire v. Estelle*, 902 F.2d 749, 754 (9th Cir. 1990). This holding was contrary to the conclusions of the state trial and appellate courts. Although respondent discusses the limits, as he views them, of state law on the admission of prior injuries in a child abuse case, RB at 24-28, he focuses less on the *admission* of the evidence than on its permissible *use* under the instructions. He thus tacitly recognizes that state-law questions relating to the admission of evidence are not properly the subject of habeas corpus review. *See* PB at 18; *Moore v. Illinois*,

408 U.S. 786, 799 (1972) (admissibility of evidence under state law not subject to review by this Court). As the Seventh Circuit recently emphasized, "whether the state court correctly understands the law is a question beyond the reach of a federal court on collateral attack." *Bates v. McCaughtry*, 1991 U.S. App. LEXIS 10891 at *9 (7th Cir. 1991), decided May 30, 1991 in 89-3195. The question, therefore, is not whether state law allowed admission of the prior injury or misconduct evidence, but whether the instructions allowed use of the evidence for an unconstitutional purpose. We consider the instruction below.

The amici discussion of character evidence and its historical development is interesting but ultimately unenlightening. As noted in their brief, California generally precludes evidence of character to prove conduct on a specified occasion. *See*, Calif. Evid. Code § 1101. Whether the Due Process Clause prohibits evidence offered solely to demonstrate criminal propensity, as amici argue, need not detain by this Court because the evidence was not offered or used for that purpose.[2] As discussed

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2. We note, however, that while "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," the clause has never been viewed by "this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). The "Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules . . . ." *Marshall v. Lonberger*, 459 U.S. 422, 438-439, n. 6 (1983). In short, there is no basis for holding that the Fourteenth Amendment

in our opening brief, PB at 34-35, evidence of the prior injuries to Tori supported the battered child diagnosis; the attacks on respondent's wife rebutted portions of her testimony; and evidence of the mistreatment of Tori by respondent was admitted without objection. We thus turn to the instruction and the purposes for which the jury was allowed to consider this evidence.

B. Jury Instruction

Respondent and amici discuss at length the jury's consideration of the prior injuries and misconduct, but focus almost exclusively on one instruction, which they, like the Ninth Circuit, inappropriately extract and isolate out of context. *Francis v. Franklin*, 471 U.S. 307, 315 (1981). Even so, the instruction at issue did not authorize the jury to consider the evidence in any unconstitutional manner.

The trial court instructed the jury that evidence showing the commission by respondent of acts similar to

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mandates that the states follow specific evidentiary rules.

Moreover, the rule proposed by amici arguably violates the prohibition against creation of new rules on federal habeas corpus first announced in *Teague v. Lane*, 489 U.S. 288 (1989). The mere fact that a rule of evidence has been adopted by the states does not mean that it is compelled by the Constitution. Amici's effort to avoid this problem, Defense Attorneys at 12, n. 6, is completely inconsistent with this Court's development of the *Teague* doctrine in *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2829-2830 (1990).

those constituting the charged offense had been admitted, but that evidence, "*if believed*," could *not* be considered to prove that respondent was a person of bad character or had a disposition to commit crimes. Rather, it could only be considered for one of three purposes: (1) to impeach Mrs. McGuire's testimony that she had no reason to fear respondent; (2) to establish the battered child syndrome; or (3) to permit the logical conclusion that petitioner committed the murder if the jury found a "*clear connection*" between the other offenses and the charged crime. J.A. 40-41, emphasis added.[3/] Nothing in the Constitution prohibits a state court jury from considering evidence of misconduct if it believes the evidence, finds a clear connection between those acts and the charged offense, and logically concludes that if the defendant committed those offenses, he also committed the charged crime. *See, e.g., Moore v. Illinois*, 408 U.S. at 799-800 (admission of shotgun found in defendant's car but concededly not the murder weapon was not "so irrelevant or so inflammatory" that defendant was denied a fair trial).

The thrust of respondent's complaint is that the instruction allowed the jury to infer his guilt from Tori's prior injuries despite the absence of evidence establishing that petitioner caused those injuries. The evidence,

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3. The word "clear" in part three was excluded from the Ninth Circuit's quotation of the instruction. *Compare* 902 F.2d at 754 *with* J.A. 41; *see* SG 6-7, n. 1.

however, showed that only respondent and his wife cared for the baby; that respondent had no explanation for bruises discovered by Mrs. McGuire on Tori before the fatal blows; that respondent had handled the baby in an irresponsible and brutal manner; that respondent had exclusive custody of Tori before her death; that the fatal wounds could not have been inflicted at the time Mrs. McGuire claimed she struck Tori; that respondent had no answer when his wife accused him in the waiting room of being "responsible" for Tori's condition; and that respondent's proffered explanation for the injuries was physically impossible. In short, if the jury believed the prosecution evidence, it could logically conclude that respondent was responsible for Tori's past injuries and the fatal blows delivered on July 7, 1981.

Respondent equates the limiting instruction on consideration of other misconduct evidence with cases involving unconstitutional mandatory presumptions. The effort is unpersuasive.

When considering a claim of this sort, the Court must first determine whether the instruction creates a mandatory presumption or a permissive inference. *Francis v. Franklin*, 471 U.S. at 314. A mandatory presumption offends due process by telling the jury that it must find the elemental fact upon proof of the basic fact unless the defendant rebuts the presumed connection. *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979). An inference, however, simply suggests a possible conclusion

to be drawn if the state proves the predicate facts, but does not require the jury to draw that conclusion. *Francis*, at 314. The Court must examine the evidentiary device as described by the actual language of the instruction and the manner "in which a reasonable person could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979); *see also*, *Yates v. Evatt*, ___ U.S. ___, 59 LW 4509, 4512 (1991).[4]

The language of the prior misconduct instruction is entirely permissive. The jury was told that evidence could be considered *if believed* only for certain limited purposes. The prior misconduct could be used to infer guilt only if the jury found a "clear connection" between those acts and the charged offense. The evidence could not be considered for any other purpose. No reasonable juror would interpret the instruction as undermining his or

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4. In *Boyde v. California*, ___ U.S. ___, 110 S.Ct. 1190, 1198 (1990), the Court held that the appropriate test for an instruction which is not concededly erroneous is "whether there is a reasonable likelihood that the jury" applied the instruction in an unconstitutional manner. The Court concluded that this test "better accommodates the concerns of finality and accuracy" than the "single hypothetical 'reasonable' juror" used in *Sandstrom* and the other presumption cases. *Id.* In *Yates*, however, the Court returned to the "reasonable juror" standard. Respondent's discussion intermingles the two tests. RB at 40-41. Given the Court's recent emphasis on the importance of finality in habeas review of state court convictions, *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1468-1469 (1991), we think that the reasonable likelihood test of *Boyde* and focus on the jury as a whole is the better approach to review of instructions. Because the instruction in this case was proper under any test, we follow the reasonable juror standard of *Yates*.

her obligation to find the ultimate facts beyond a reasonable doubt. This Court's presumption cases are inapplicable.

C. Respondent's Trial Was Fundamentally Fair

In Argument II of Petitioner's Brief on the Merits we urged the Court to develop a test for determining whether a state criminal defendant was denied a fundamentally fair trial. PB at 38-49. Specifically, we argued that a defendant is not denied fundamental fairness due to the admission of challenged evidence unless a reasonable probability appears that exclusion would have produced a more favorable result. PB at 46-47. Neither respondent nor his amici has challenged the need for or formulation of that test.[5/] Just as the Court found it appropriate to "define the doctrine of abuse of the writ with more precision" in *McCleskey v. Zant*, 111 S.Ct. at

5. Amici's defense of habeas corpus review as the proper remedy for denial of a fundamentally fair trial, Defense Attorneys at 23-30, is based primarily on the "revisionist view" of habeas corpus, *Schneckloth v. Bustamonte*, 412 U.S. 218, 252 (1973) (Powell, J., concurring), which this Court abandoned in recent cases. *See, e.g., McCleskey*, 111 S.Ct. at 1468-1469; *Coleman v. Thompson*, ___ U.S. ___, 59 L.W. 4789, 4795-96 (1991). We recognize that federal review is appropriate "when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." *McCleskey*, at 1469. The limited scope of that review when the claim is based not on a specific constitutional provision but on the Due Process Clause of the Fourteenth Amendment is best defined by the reasonable probability test set forth in our opening brief.

1467, the time is ripe to define with more precision the limits of a fundamentally fair trial.

Neither the prior misconduct or injury evidence, nor the instruction defining its use, was prohibited by any specific constitutional provision. The impact of Tori's prior injuries and the battered child diagnosis has been discussed. PB at 47-49. Because the evidence and the jury instruction do not undermine confidence in the conviction for second degree murder, respondent received a fundamentally fair trial.

CONCLUSION

We respectfully request that the judgment of the Court of Appeals be reversed.

DATED: July 2, 1991.

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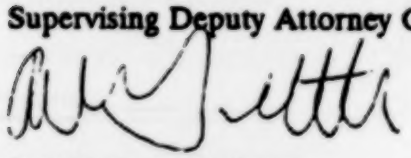

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Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

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v.

MARK OWEN MCGUIRE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the introduction of medical evidence of a child's prior injuries in a child abuse case violates due process in the absence of direct evidence that the defendant inflicted the prior injuries.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1074

WAYNE ESTELLE, WARDEN, PETITIONER

v.

MARK OWEN MCGUIRE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents issues concerning the scope of federal habeas corpus, the extent to which proof of past injuries to a child can constitutionally be admitted in a case involving child abuse, and, more generally, the extent to which evidentiary rulings are subject to constitutional scrutiny under the Due Process Clause. The United States has a substantial interest in all three issues. First, the proper administration of habeas corpus has been the subject of sustained congressional and Executive Branch attention. Second, the issue of the admissibility of evidence of prior injuries arises frequently in child abuse cases that the United States prosecutes because of its law

enforcement responsibilities in connection with the District of Columbia, federal reservations, and the military. Finally, because of its involvement in litigation and its concern with the continuing development of enlightened rules of evidence, the United States has an interest in ensuring that the Due Process Clause is not applied to impose on the States and the federal government an inflexible code of evidence as a matter of constitutional compulsion.

STATEMENT

1. On the evening of July 7, 1981, respondent and his wife, Daisy McGuire, brought their six-month-old daughter, Tori, to a hospital in Hayward, California. The baby was bluish and not breathing. The screening nurse immediately rushed Tori to an emergency treatment room to receive medical treatment and then returned to obtain a medical history. Respondent told the nurse that Tori had had a cold recently and had hit her head that morning when she had fallen from a couch. Pet. App. A28, A61, A62.

As she attempted to treat Tori, the attending physician noticed a large and relatively recent bruise on the infant's chest with multiple bruises around it. She also noticed black and blue marks on Tori's ears, and scar tissue indicating tearing around her rectum. Pet. App. A28.

Efforts to revive the baby were unsuccessful. She died 45 minutes after being brought to the hospital. Pet. App. A28.

Questioned by police that night and the following day, respondent said he believed the baby had fallen off the couch and struck her walker. He said that Daisy went out to make a phone call and that he went upstairs, leaving the baby lying on the couch. He said he heard the baby cry, and when he came back

downstairs, he found the baby lying on the floor. When an officer expressed skepticism that the child's injuries could have resulted from a fall off the couch, respondent replied, "Maybe some Mexicans came through the door" while he was upstairs. Pet. App. A4, A29-A30, A63; Tr. 209. Questioned separately by police officers, Daisy McGuire stated that she had not hit the baby and that she did not know whether her husband had done so. Pet. App. A29.

An autopsy was subsequently performed. It revealed 17 contusions on the baby's chest, 29 contusions in her abdominal area, a split liver, a split and lacerated pancreas, a lacerated large intestine, and a damaged lung and heart vein. The autopsy also revealed evidence of rectal tearing, which was at least six weeks old, and evidence of partially healed rib fractures, which were approximately seven weeks old. Pet. App. A28-A29, A62-A63.

2. Respondent was charged with second degree murder. At trial, the attending physician testified about the bruises on Tori's chest and ears and the scar tissue on her rectum. Another doctor testified about the autopsy results, including the evidence of rectal tearing and partially healed rib fractures. Both physicians testified that the injuries, including the prior rib and rectal injuries, were indicative of what they referred to as "battered child" syndrome. Pet. App. A28-A29, A31, A63.

In addition to introducing the medical evidence and the statements respondent had made to the police, the State called a witness who overheard a conversation between respondent and his wife in the hospital emergency room. According to the witness, Daisy repeatedly asked respondent "what really happened." Respondent replied that he "guessed" the baby fell

off the couch. Daisy continued to press for an answer. At one point she said, "I am very patient. I can wait a long time. I want to know what really happened." Tr. 178. Finally, Daisy told respondent that "the baby was alright when I left. You are responsible." Tr. 179.

A neighbor of respondent's testified that she had seen respondent physically abuse Daisy and that she had seen respondent pick up Tori by one of her arms and roughly pinch the infant's cheeks together. She further testified that she had never seen Daisy abuse the child in any way. The neighbor added that Daisy had told her she was afraid to leave Tori with respondent because he had been rough with the baby and "did bad things" to her. Tr. 462-472, 488-489.

Daisy McGuire testified at trial under a grant of transactional immunity. In contrast to her prior statement to the police, she testified at trial that she had beaten the child on the day of the injuries before her husband came home. Pet. App. A4-A5, A63.

On March 19, 1982, the jury convicted respondent of second degree murder. Pet. App. A5.

3. In January 1985, the California Court of Appeal affirmed respondent's conviction. Pet. App. A61-A71. As one of his arguments, respondent maintained that "[t]he trial court erred in admitting evidence of prior injuries which were in no way tied to [him]." *Id.* at A64. The Court of Appeal responded that the evidence had been introduced to establish "battered child syndrome," and it explained the nature and purpose of evidence of "battered child syndrome" under California law:

> [T]his syndrome means that a child has received repeated and/or serious injuries by non-accidental means. * * * [T]he criteria for the 'battered child syndrome' * * * are (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect * * *.
>
> A finding . . . of the 'battered child syndrome' * * * simply indicates that a child found with the injuries outlined above has not suffered those injuries by accidental means.

Id. at A65-A66 (internal quotation marks omitted). The court then concluded that, under state law, the introduction of the medical evidence of the infant's prior injuries to establish "battered child syndrome" was "patently proper." *Id.* at A66.

Respondent sought further review from the California Supreme Court. In March 1985, that court denied the request to review respondent's conviction. Pet. App. A5.

4. Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. In July 1987, the district court denied the petition. Pet. App. A27-A42. Among other issues, the court rejected respondent's contentions that the admission of the evidence of prior injuries—the rib fractures and rectal tearing—was impermissible, and the trial court's instruction on the use of prior act evidence was improper. *Id.* at A31-A36.

With respect to the evidence of the prior injuries, the court found that the use of that evidence to establish "battered child syndrome" was proper under California law and that the introduction of that evidence did not violate the Due Process Clause. Pet.

App. A31-A32. The court rejected respondent's claims that "the prior act evidence was irrelevant, because no defense of accident was ever presented, and cumulative, because testimony of doctors at trial already established that death was not the result of accident without resort to prior act evidence." *Id.* at A32. The court held that the evidence was relevant to the State's case-in-chief to show that Tori's death was the result of criminal conduct and to rebut respondent's prior statement that the baby may have died as the result of a fall from a couch. *Ibid.* Moreover, the court noted, "even if admission of prior act evidence was irrelevant and/or cumulative, [respondent] has not shown that it was so prejudicial as to amount to a denial of fundamental fairness." *Ibid.*

With respect to the jury instruction, respondent claimed that one portion of the instruction "improperly allowed the jury to base its verdict on acts for which [respondent] was not on trial and to which he was not connected, instead of limiting the use of the prior act evidence to show absence of accident." Pet. App. A34.[1] The court found that it was a close question whether Part 3 of the instruction violated the California Evidence Code on the use of prior act evidence. But the court found it unnecessary to reach that issue, because respondent had not demonstrated that "any possible error rendered his trial so fundamentally unfair that he was denied due process." Pet. App. A35. The court emphasized that "there was substantial evidence, however circumstantial, to support the jury's finding that the baby's death was the result of a murder and that petitioner was responsible." *Id.* at A36.

5. The court of appeals reversed and granted habeas corpus relief because it concluded that the evidence of Tori's prior injuries had been improperly introduced and that the jury instruction had exacerbated the error. The court held that "the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered [respondent's] trial arbitrary and fundamentally unfair." Pet. App. A8-A9.

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[1] The court instructed the jury:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you[,] to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant.
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case.
>
> You are not permitted to consider evidence for any other purpose.

Tr. 756-757. (Both the district court and the court of appeals omitted the word "clear" from Part 3 of the instruction quoted above. Pet. App. A12-A13, A33-A34). Respondent claimed that the reference to "the other two offenses" in Part 3 was a reference to his rough treatment of his wife and baby, but the district court held that, in context, it was a reference to "the two prior injuries to the baby" (the fractured ribs and rectal tearing). *Id.* at A34 n.1.

With regard to the introduction of the evidence, the court first concluded that the "extensive evidence of prior physical abuse the baby had suffered * * * has no relevance to [respondent] because the prosecution did not establish that [respondent] inflicted those injuries." Pet. App. A9. Emphasizing that "[e]vidence cannot have probative value unless a party connects it to the defendant in some meaningful way," the court found that "the prosecution made no such connection" to respondent, and that "acts which the prosecution did not connect to [respondent] cannot be characterized as *his* prior acts." *Id.* at A9-A10. The court then proceeded to find the introduction of the evidence prejudicial. The court of appeals concluded that the evidence was admitted erroneously, as a matter of state law, because no claim had been made at trial that the baby died accidentally. *Id.* at A11. The court thus found that the evidence of prior injuries had been introduced "to establish that [respondent] was a child abuser, and for no other purpose." *Id.* at A10-A11.

With regard to the jury instruction, the court found that "[t]he trial court did not merely admit irrelevant, highly prejudicial evidence without comment. The trial court *instructed* the jury to use that evidence in the most improper way possible." Pet. App. A12. In the court's view, the instruction impermissibly permitted the jury "to make a direct determination of guilt by concluding that [respondent] committed prior bad acts." *Id.* at A13.[2] The court concluded that this instruction, "considered along with the admittance of the prejudicial evidence," in-

[2] The court also observed that the trial court's instruction "appears" to have been "an incorrect reading" of California's standard jury instructions. Pet. App. A13 n.2.

fected the entire trial, and that the combined error was not harmless because, "[a]lthough there was evidence suggesting [respondent's] guilt, this evidence was certainly not overwhelming." *Id.* at A12-A14 & n.2.[3]

6. Judge Kozinski, in an opinion joined by Judge Trott, dissented from the denial of rehearing en banc. The dissent made four points: (1) the panel improperly second-guessed the state courts on questions of state law; (2) the evidence of prior injuries was relevant to establish intent and to foreclose a conclusion that the death was accidental; (3) the panel's harmless error analysis was flawed; and (4) the panel's decision might preclude a retrial because it included comments about the lack of proof, which might be taken as a finding that the evidence at trial was insufficient to support the verdict. Pet. App. A43-A60.

SUMMARY OF ARGUMENT

In reaching its conclusion that respondent was entitled to habeas corpus relief, the court of appeals committed a series of related errors that reflect a misapprehension of a federal court's authority to review state court evidentiary rulings that are challenged under the Due Process Clause.

First, the court of appeals was incorrect in holding that due process prohibits the introduction, in a child abuse case, of medical evidence of the child's prior injuries unless there is evidence showing that the de-

[3] The opinion on which the final judgment was based was the court of appeals' second opinion in this case. The panel issued an initial opinion on May 8, 1989 (Pet. App. A16-A26), reaching the same result. It withdrew that opinion on April 23, 1990, and filed its second opinion on May 4, 1990. *Id.* at A1.

fendant caused the injuries. It has long been recognized that anonymous similar act evidence may be highly probative on material issues such as whether a particular injury was part of a pattern that suggests a non-accidental cause. There is a particularly sound basis for admitting evidence of a pattern of prior injuries suffered by a young child, because medical evidence of such injuries is an important element of the accepted medical diagnosis of "battered child syndrome," which justifies the conclusion that the child did not receive her injuries accidentally.

Second, to the extent that a connection to the defendant is necessary, it may be proved by circumstantial evidence. Here, there was abundant circumstantial evidence of such a connection, including testimony that respondent and his wife were the caretakers of the infant and that respondent, but not his wife, had been seen treating the baby roughly.

Third, the court of appeals improperly rejected the state court's interpretation of California law and based its decision to grant habeas corpus relief at least in part on its own interpretation of the State's rules of evidence. Federal habeas corpus jurisdiction provides no warrant for a federal court to review the application of state rules of evidence and to grant a writ of habeas corpus if it finds that the state courts committed a violation of state law.

Fourth, the court of appeals mistakenly suggested that, at least in this context, a defendant's failure to put a particular element in issue precludes the government from introducing evidence on that issue. Because the burden of proof rests on the government to prove every element of the offense, regardless of whether the defendant offers evidence or argument on each element, it is unrealistic to say that when a

defendant fails to challenge the sufficiency of the prosecution's evidence on a particular element, that element has not been "put in issue." For that reason, the government should not, as a matter of constitutional command, be precluded from introducing evidence relating to a particular element simply because a defendant does not affirmatively contest that element during the trial. In any event, in this case it was clear from all the evidence at trial that respondent effectively put both the question of accident and the question of intent into issue. The principal theory of his defense was that Tori died as the result of mistreatment by Daisy McGuire and that respondent did not harm the child. But the jury obviously could have rejected Daisy McGuire's testimony as a fabrication intended to protect respondent. In that event, the jury would have to decide whether the child died as a result of an accident or as a result of an intentional assault. The challenged evidence was highly pertinent to the latter issue.

Finally, the court of appeals was wrong in holding that the trial court's instruction to the jury regarding the prior injury evidence justified granting the writ of habeas corpus. Viewed in the context of the other instructions and the trial as a whole, the instruction simply permitted the jury to take account of Tori's prior injuries, in connection with the evidence of respondent's past mistreatment of the child, in determining whether respondent was responsible for inflicting the injuries that led to her death. That use of the evidence was entirely proper and did not deny respondent a fair trial.

ARGUMENT

RESPONDENT WAS NOT DENIED DUE PROCESS AS A RESULT OF THE INTRODUCTION OF EVIDENCE OF HIS CHILD'S PRIOR INJURIES

A. The Introduction Of Medical Evidence Of A Child's Prior Injuries In A Child Abuse Case Does Not Require Evidence That The Defendant Inflicted The Injuries

Federal courts "do not sit to review state court actions on the propriety of [a] trial judge's actions in the admissibility of evidence." *Lisenba* v. *California*, 314 U.S. 219, 228 (1941). This Court has repeatedly stated that "[b]eyond the specific guarantees in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 110 S. Ct. 668, 674 (1990). Thus, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983). See *Burgett* v. *Texas*, 389 U.S. 109, 113-114 (1967) ("We do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution."); *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967) ("[I]t has never been thought that [prior] cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority.").

In the absence of a claim that evidence violates a specific constitutional guarantee (such as the Confrontation Clause, see, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. 56 (1980)), a particular evidentiary ruling violates

the Constitution only if it "so infuse[s] the trial with unfairness as to deny due process of law." *Lisenba*, 314 U.S. at 228. See *Buchalter* v. *New York*, 319 U.S. 427, 429-430 (1943) (Due Process Clause addresses "fundamental principles of liberty and justice" and otherwise "leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate"; it "does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court"); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934) ("The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. * * * Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."). Far from infusing the trial with unfairness, the introduction of medical evidence of a child's prior injuries, even without evidence that the defendant inflicted the injuries, is often highly relevant and is widely regarded as admissible for that reason.

It has long been recognized that similar act evidence may have probative value even if it is not shown that the defendant committed the similar acts. As one leading commentator has observed, "in principle, anonymous acts can be admitted either to prove the actus reus (the commission of a criminal or tortious act by someone) or to negative innocent intent." E. Imwinkelried, *Uncharged Misconduct Evidence* § 2:05, at 8 (1984). He explains:

> The probative value of the acts for these purposes rests on the doctrine of chances. For instance, as a matter of common human experience, it is objectively improbable that several accidental fires will occur at buildings owned by the same person within a short period of time. In an arson prosecution or an insurance case in which the insurer defends on the ground of the insured's arson, evidence of other fires is relevant to prove the incendiary origin of the fire giving rise to the suit. The evidence has a tendency in reason to increase the possibility of human intervention and to disprove natural causation. The other fires are admissible to prove the actus reus of arson even if the proponent of the evidence cannot link the defendant to the fires.

Ibid. (footnotes omitted). See also *Lisenba*, 314 U.S. at 227-228; *State* v. *Lapage*, 57 N.H. 245, 294 (1876); 2 J. Wigmore, *Wigmore on Evidence* §§ 302, 303, 363 (Chadbourn rev. 1979). Thus, the court of appeals' suggestion that evidence of prior injuries has "no relevance" without proof that the defendant inflicted the injuries (Pet. App. A9) is incorrect.[4]

The admissibility of evidence of prior injury is especially justified in a child abuse case, because the evidence of prior injuries is an aspect of the medical diagnosis of "battered child syndrome," a diagnosis developed in the early 1960's,[5] and accepted as evi-

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[4] States may, of course, take different views of the relevance of anonymous act evidence. See, *e.g.*, E. Imwinkelreid, *supra*, at § 2:05 (discussing different approaches). The discussion above is not to suggest that only one view of such evidence is appropriate; rather, it is to suggest that a view that such evidence is probative is not arbitrary or bizarre, and thus does not violate fundamental fairness.

[5] See McCoid, *The Battered Child and Other Assaults Upon The Family: Part One*, 50 Minn. L. Rev. 1 (1965); Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962).

dence of child abuse in a number of jurisdictions.[6] When offered to show that a child's injuries are the product of child abuse, rather than accident, evidence of prior injuries is relevant without regard to the identity of the person who inflicted those injuries.[7] Such evidence is especially important in child abuse

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[6] See, *e.g.*, *State* v. *Moyer*, 151 Ariz. 253, 727 P.2d 31 (Ct. App. 1986); *People* v. *Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); *State* v. *Dumlao*, 3 Conn. App. 607, 609-610, 491 A.2d 404, 409 (App. Ct. 1985); *People* v. *DeJesus*, 71 Ill. App. 3d 235, 389 N.E.2d 260 (1979); *Commonwealth* v. *Labbe*, 6 Mass. App. 73, 373 N.E.2d 227 (App. Ct. 1978); *State* v. *Goblirsch*, 309 Minn. 401, 246 N.W.2d 12 (1976); *Bludsworth* v. *State*, 98 Nev. 289, 646 P.2d 558 (1982); *People* v. *Henson*, 33 N.Y.2d 63, 349, N.Y.S.2d 657, 304 N.E.2d 358 (1973); *State* v. *Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978); *Ashford* v. *State*, 603 P.2d 1162 (Okla. Crim. App. 1979); *Commonwealth* v. *Rogers*, 364 Pa. Super. 477, 528 A.2d 610 (1987); *State* v. *Best*, 89 S.D. 227, 232 N.W.2d 447 (1975); *State* v. *Tanner*, 675 P.2d 539 (Utah 1983). See also *United States* v. *Bowers*, 660 F.2d 527 (5th Cir. 1981).

[7] See, *e.g.*, *Bludsworth* v. *State*, 98 Nev. at 291-292, 646 P.2d at 559 ("Appellants also erroneously argue that the bite mark evidence and evidence of other bruises were incompetent because there was no prior establishment, by clear and convincing evidence, that either [defendant] was responsible for each of the prior injuries. Admissibility of the bite mark and other bruise evidence does not depend on connecting either defendant to the infliction of the injury. It is independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidentally injured on the day in question. Proof that a child has experienced injuries in many purported accidents is evidence that the most recent evidence may not have resulted from yet another accident.") (footnote omitted). See also Myers, *Uncharged Misconduct in Child Abuse Litigation*, 1988 Utah L. Rev. 479, 518-519.

cases because proof of such crimes, which frequently occur without third-party eyewitnesses and in a context of victim helplessness, is notoriously difficult.[8]

Evidence of a child's prior injuries may therefore provide support for a medical diagnosis indicating the cause of the victim's death. For that reason, the evidence of injuries, as an element of that diagnosis, should be viewed primarily as medical evidence regarding the victim's condition, rather than as so-called "character evidence" pertaining to the defendant. As one pair of commentators has observed:

> "[B]attered child syndrome" is a *medical diagnosis* based on expert observation of a child's damaged body. The diagnosis does not depend on evidence of defendant's conduct toward the child. Nor does it hinge on proof of defendant's character or propensity to abuse children. In other words, testimony on the battered child syndrome is *not* character evidence. Thus, testimony on the battered child syndrome is not barred by the rule prohibiting evidence of a person's character to prove that the person acted in conformity therewith on a particular occasion.

Myers & Carter, *Proof of Physical Child Abuse*, 53 Mo. L. Rev. 189, 193 (1988) (footnote omitted).

The court of appeals' ruling creates a curious anomaly that illustrates the flaw in the court's analysis. Under the court of appeals' ruling, the attending physician's testimony regarding the bruises on Tori's chest and ears was admissible to show the

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[8] See, *e.g.*, Myers, *supra*, 1988 Utah L. Rev. at 479 ("Child abuse is maddeningly difficult to prove."). See also *State* v. *Tanner*, 675 P.2d at 541 ("The key evidence in this case is the mute testimony of the body of three-year-old Tawnya Tanner.").

cause of death. But when the physician also testified about the evidence of rectal tearing that she discerned, and about the evidence of rib injuries from the autopsy results, she crossed into the zone of irrelevance and prejudice (and constitutional prohibition). Similarly, the pathologist's testimony regarding the autopsy evidence of 46 contusions on the infant's body and massive injuries to her liver, pancreas, intestine, lung, and heart was relevant and admissible. But when he testified about the autopsy evidence of rib and rectal injuries, he, too, crossed into the zone of the impermissible.

The distinction between the two types of evidence does not hold up. The evidence of the recent injuries was admissible because it tended to show that the infant had died as the result of a number of separate wounds. That was an important fact in the case, because it tended to show that the infant's death could not have been the product of an accident, such as a fall from a couch. The evidence that the infant had suffered a whole series of wounds made it virtually certain that the injuries were intentionally inflicted. That is a powerful basis for admitting the evidence. Yet it is for precisely that reason that the evidence of Tori's prior injuries was admissible: they tended to show that the infant had suffered abuse over a long period of time and that the infant's injuries were therefore not likely to have been the result of an accident suffered on the day of her death. Instead, they were part of a pattern—indeed, a medically recognized pattern—that speaks powerfully to the cause of death.

To be sure, one federal child abuse decision, in the course of analyzing child abuse evidence under Fed. R. Evid. 404(b), has held that evidence of prior injuries to a child should not have been introduced be-

cause there was no proof that the defendant inflicted the prior injuries. See *United States* v. *Brown*, 608 F.2d 551 (5th Cir. 1979). See also *United States* v. *Colvin*, 614 F.2d 44, 45 (5th Cir.) (distinguishing *Brown* because there was sufficient evidence to conclude that the defendant inflicted the prior injuries), cert. denied, 446 U.S. 945 (1980); *United States* v. *Harris*, 661 F.2d 138, 143 (10th Cir. 1981) (same). Obviously, evidence connecting the defendant to prior injuries inflicted on the victim or others adds to the probative value of the "other injury" evidence. But that is not to say that that evidence is irrelevant in the absence of proof that the defendant caused those other injuries. To the extent the *Brown* decision suggests that proof of prior injuries suffered by a child is not probative of the cause of death or subsequent injuries, we believe it was wrongly decided.

The *Brown* court fell into error, we submit, by characterizing the proffered evidence as a form of "similar act" evidence offered to show that a defendant who acted in a particular manner in the past may have acted that way in connection with the events at issue in the trial. The "similar act" evidence in the *Brown* case failed the test of relevance, the court concluded, because the evidence of prior misconduct was not sufficiently tied to the defendant. It is, of course, often the case that "similar act" evidence is not relevant if the jury cannot reasonably conclude both "that the act occurred and that the defendant was the actor." *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988). For example, evidence in a bank robbery prosecution that a number of highly similar bank robberies were committed in the same period of time is irrelevant unless there is some basis to believe that the defendant was involved in

the uncharged robberies. But that does not mean that all evidence of similar events in the past is admissible only if the prior events can be tied to the defendant. The prior events may be relevant for purposes quite independent of the direct inference that the person who committed those acts is likely to have committed the ones charged in the indictment. The requirement of some independent basis for relevance is satisfied in this case, because medical evidence of battered child syndrome is highly probative in showing that death was not caused by accident, but by the intentional act of someone with access to the victim. Particularly where, as here, the number of persons with access to the victim is very small, evidence that the homicide was intentional is a very important part of the State's case.

B. To The Extent That A Connection Between The Defendant And The Prior Injuries Is Necessary, Circumstantial Evidence Can Provide That Connection

If, contrary to our submission, the Constitution requires that the government show a connection between the defendant and the victim's prior injuries before evidence of those injuries may be admitted, even in a case involving battered child syndrome, that connection was provided by the circumstantial evidence in this case. Circumstantial evidence is, of course, fully admissible, and it may support a conviction even if it is unaccompanied by any direct evidence.[9]

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[9] See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121, 140 (1954). See also *United States* v. *Corpus*, 882 F.2d 546, 550 (1st Cir. 1989); *United States* v. *Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987); *United States* v. *Maggitt*, 784 F.2d 590, 593 (5th Cir. 1986).

In holding that the evidence in this case did not support a connection between respondent and Tori's prior injuries, the court of appeals ignored strong circumstantial evidence pointing to respondent as the party responsible for those injuries. Respondent and Daisy had custody of Tori for the entire six months of her life. Pet. App. A63. There was evidence at trial indicating that respondent had been rough with the child. *Id.* at A63-A64. In addition, a neighbor testified that Daisy had said she feared leaving the baby with respondent, because he "did bad things" to the child. *Id.* at A10; Tr. 470. At the time of the infant's death, moreover, respondent gave the police two highly implausible explanations for her injuries (the fall from the couch and the possible intercession of "some Mexicans"). Pet. App. A29-A30. In addition, respondent's hospital conversation with Daisy strongly supports the conclusion that he, and not Daisy, inflicted the injuries on Tori. *Id.* at A55-A56, A63.

From all of that evidence, the jury could conclude (1) that the only two people with sufficient access to the child to administer repeated physical abuse were respondent and his wife; and (2) that respondent was far more likely than his wife to have been the person who abused the child. Although some of the circumstantial evidence cited above related to the incident that led to Tori's death, the jury could properly use that evidence to assist it in determining whether respondent was also involved in the prior acts of abuse. See *Huddleston*, 485 U.S. at 691. Thus, even if the court of appeals were correct that due process requires a connection between the defendant and the medical evidence of prior injuries, the court of appeals' conclusion that there was no such connection here was incorrect.

C. The Purported Misapplication Of State Law Does Not Establish A Due Process Violation

The court of appeals emphasized that, in its view and despite the ruling of the California Court of Appeal to the contrary, the admission of the medical evidence of prior injuries violated state law because respondent had not explicitly raised accident as a defense. Pet. App. A11. To the extent that the court granted habeas relief because of this perceived misapplication of state law, it was in error "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984). See also *Lewis* v. *Jeffers*, 110 S. Ct. 3092, 3102 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."); *Rose* v. *Hodges*, 423 U.S. 19, 22 (1975) ("It was not the province of a federal habeas court to re-examine these [state law] questions.").[10]

The habeas corpus jurisdicition of federal courts is defined by statute. Federal habeas corpus relief is

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[10] Many court of appeals decisions have recognized this settled principle. See, *e.g.*, *Llamas-Almaguer* v. *Wainwright*, 666 F.2d 191, 193 (5th Cir. 1982) ("[I]t is elementary that questions of state law cannot be raised on federal habeas."); *Carrizales* v. *Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983) ("A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved."); *Passman* v. *Blackburn*, 652 F.2d 559, 567 (5th Cir. 1981) ("This court does not sit as a super state supreme court to review errors under state law * * *."); *United States ex rel. Burnett* v. *Illinois*, 619 F.2d 668, 671 (7th Cir. 1980) ("Errors in the interpretation of state authority are for the state supreme court to correct. This court will not take the extraordinarily intrusive action of setting aside a criminal conviction in the guise of due process review, simply because we disagree with the state court's interpretation of state law.").

available for a person who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). The federal habeas corpus statute gives federal courts no authority to grant relief based on a violation of state law. A federal court therefore exceeds its jurisdiction under the statute if it bases its judgment on a perceived violation of state law that is not also a violation of the law of the United States.

D. The Purported Absence Of An Accident Defense In This Case Does Not Render the Admission of Evidence of Prior Injuries a Violation of the Due Process Clause

Perhaps the most indefensible feature of the court of appeals' decision is its holding that the absence of a defense of accident in this case rendered the admission of the prior injury evidence a violation of due process.

The State in a criminal case must prove all the elements of the offense beyond a reasonable doubt. Moreover, "[a] simple plea of not guilty * * * puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988). A defendant's tactical decision about what issues to focus on at trial and what issues to ignore should not have the effect of disabling the government from presenting evidence on every point that the government is required to prove. Put another way, it does not violate due process for the government to prove its case.

In this case, the State was required to prove all the elements of second degree murder in order to obtain a conviction. To do so, the State had to prove that respondent's acts resulted in Tori's death and that respondent intended to kill Tori. The evidence that Tori suffered from battered child syndrome,

which was established in part by proof of her prior injuries, tended to show that someone intended to injure her, which was probative of both causation and intent.

By eliminating the possibility of accident, the State made it clear to the jury that the death was a homicide and effectively narrowed to two the number of persons who could have committed the offense. To exclude evidence showing the absence of accident simply because respondent did not principally rely on the "defense" of accident would therefore deny the State a highly probative piece of evidence going to both of the critical issues in its case.

Even if respondent had agreed to stipulate that the killing was not accidental, the State would not have been required to accept that stipulation in lieu of evidence that would make the point more forcefully for the jury. See *United States* v. *Ellison*, 793 F.2d 942, 949 (8th Cir. 1986) ("Generally, the government is not bound by a defendant's offer to stipulate to an element of a crime. * * * The rationale for the rule is to enable the government to present to the jury a complete picture of the events constituting the crime charged. 'To substitute for such a picture a naked admission might . . . rob the evidence of much of its fair and legitimate weight.' "). It follows, *a fortiori*, that in the absence of an offer to stipulate, the State should not suffer the exclusion of highly relevant evidence simply because respondent did not indicate an intention to contest that evidence directly.

As the judges who dissented from denial of rehearing en banc in this case pointed out, a holding that the State may not introduce evidence on an element uncontested by a defendant would sow confusion, because the government and the court (and perhaps

even the defendant) may not know until well into trial what issues will be contested. Pet. App. A50-A52. See, *e.g.*, *Brooks* v. *Tennessee*, 406 U.S. 605, 609-610 (1972) (emphasizing that the defense strategy may evolve as the case progresses). In fact, a defendant may not reveal his theory of defense until closing argument, when he attacks some perceived insufficiency or inconsistency in the government's case. It would therefore be unworkable to limit the government's proof based on what appears to be the theory of defense at the outset of the trial, when the defense theory may shift during the trial and may be quite eclectic by the end.

Even if it were necessary, as a constitutional matter, for there to be a specific predicate for the introduction of evidence of battered child syndrome, the issue of accident was sufficiently presented in this case that the prior injury evidence was needed to answer it. Respondent initially claimed, both to the police and to his wife, that Tori had fallen off the couch. Pet. App. A4, A29, 363. Although Daisy McGuire testified that it was she who had struck the child, respondent did not rely entirely on the theory that Daisy had committed the murder. Rather, throughout the case and even in closing argument, respondent's counsel maintained that either Daisy committed the homicide or there was no homicide at all in this case. See Tr. 689-690 ("The Prosecution has failed * * * to prove beyond a reasonable doubt that there was a murder and has failed to prove beyond a reasonable doubt that [respondent] had any[] criminal responsibility for the death of his daughter."). Counsel ultimately argued that Daisy had hit the baby, but that the baby had suffered additional injuries when she accidentally fell off the couch.

Tr. 713. In light of respondent's partial reliance on the "accident" evidence, it was particularly appropriate for the State to rebut that evidence by showing that Tori's injuries were part of a pattern that made it highly unlikely that her death was accidental.

E. The Trial Court's Instruction To The Jury Did Not Violate The Due Process Clause

The court of appeals found that the trial court's instruction regarding the use that the jury could make of the medical evidence of prior injuries was improper and contributed to the due process violation that the court found in this case.[11] For the reasons we have discussed, the court's conclusion that the evidence was improperly introduced was flawed and the court's reliance on that supposed error in analyzing the instruction was equally flawed. In addition, the instruction must be considered in the context of the instructions and the trial record as a whole to determine whether fundamental fairness was violated. See, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 146-147 (1977). Viewed without the distortion of the court's erroneous assessment of the admissibility of the evidence in question, the instruction regarding its permissible uses did not deprive respondent of due process.

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[11] See Pet. App. A8-A9 ("[W]e find that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered [respondent's] trial arbitrary and fundamentally unfair."); *id.* at A14 ("[T]he faulty instruction considered along with the admittance of the prejudicial evidence 'so infected the entire trial that the resulting conviction violate[d] due process.'"); *id.* at A15 ("[T]he prejudicial effect of the errors * * * amount[s] to a denial of due process.").

The challenged portion of the instruction advised the jury that, in addition to establishing battered child syndrome and impeaching Daisy McGuire's testimony that she had no reason to be afraid of respondent, the prior injury evidence could be used, if certain conditions were met, to support the inference that respondent had beaten Tori. In particular, the court told the jury that, if it found a sufficiently "clear connection" between the prior injuries and the injuries that resulted in Tori's death, the jury could conclude that if respondent "committed other offenses, he committed the crime charged in the case." Tr. 756-757; see note 1, *supra*. While the language of that instruction is not as clear as it might have been, the point of the instruction is apparent. The court was advising the jury, in effect, that if it found a "clear connection" between the prior injuries and the instant injuries, and if it found that respondent had committed the prior injuries, the jury could find that he also committed the injuries that led to Tori's death.

That instruction states, in a general way, the principle that underlies much "similar act" evidence: if there is some clear connection between one act and another, evidence that a person committed the first act may help prove that he committed the second. As applied to this case, moreover, that instruction could not have misled the jury.

Other than Daisy McGuire's testimony, given under a grant of transactional immunity and impeached by prior inconsistent statements, the evidence in this case indicated that it was respondent, and not his wife, who had mistreated Tori in the past. It was perfectly permissible for the jury to consider the circumstantial evidence of respondent's responsibility for the prior assaults as bearing on the likelihood

that it was respondent, and not his wife, who administered the blows that resulted in Tori's death.

Furthermore, the trial court guarded against possible misuse of the instruction by specifically advising the jury that the evidence "may not be considered * * * to prove that [respondent] is a person of bad character or that he has a disposition to commit crimes." Tr. 756-757. The instructions as a whole, moreover, repeatedly emphasized that the jury must find respondent guilty of the charged offense beyond a reasonable doubt. Tr. 751, 761, 762, 765. The court's instruction to the jury regarding the possible logical relationship between Tori's prior injuries and the injuries that led to her death was therefore not erroneous even under conventional principles of evidence law, and it was certainly not so unfair as to deprive respondent of due process.[12]

Finally, even an erroneous jury instruction rises to the level of a due process violation only if there is prejudice. *Cupp* v. *Naughten*, 414 U.S. at 147. Here, in view of the evidence of the extensive injuries im-

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[12] Indeed, although it is not necessary to reach the issue in this case, it is far from clear that a state law would violate the Due Process Clause if it permitted the use of "prior crimes" evidence to show propensity to commit a charged offense. As this Court has noted, "such facts might logically be persuasive that [a defendant] is by propensity a probable perpetrator of the crime." *Michelson* v. *United States*, 335 U.S. 469, 475 (1948). The law of character evidence acknowledges the force of that proposition. *Edgington* v. *United States*, 164 U.S. 361, 366 (1896). Such evidence is typically excluded not because it lacks relevance, but because of concern that the finder of fact may give it undue weight. It has never been established, however, that a State is constitutionally barred from deciding that the "admitted probative value" of such evidence, *Michelson*, 335 U.S. at 476, outweighs the possibilities of jury prejudice and confusion.

mediately prior to the death and the circumstantial evidence pointing to respondent (including the overheard hospital conversation, the evidence that respondent was alone with the baby shortly before the trip to the hospital, and respondent's extremely implausible attempts to explain the injuries), any claim of prejudice is especially weak.

In sum, neither the admission of the medical evidence of Tori McGuire's prior injuries nor the instruction given to the jury regarding the use of that evidence constituted a violation of respondent's right to due process. In deciding to invalidate the result of the state court proceeding, the court of appeals misapplied ordinary principles of relevance, misconceived its authority under the federal habeas corpus statute, and misinterpreted the role assigned to the Due Process Clause in reviewing ordinary evidentiary rulings made in state court proceedings.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282081 20483

Supreme Court, U.S.
FILED
APR 11 1991
OFFICE OF THE CLERK

No. 90-1074

IN THE

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OCTOBER TERM, 1990

WAYNE ESTELLE, Warden,

Petitioner,

vs.

MARK OWEN MCGUIRE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Is a state court's determination that evidence is relevant and admissible under state law binding on the federal habeas corpus court?

2. Would a federal rule requiring exclusion of evidence on grounds of relevance, despite its admissibility under state law, be a "new rule" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989)?

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IN THE

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OCTOBER TERM, 1990

WAYNE ESTELLE, Warden,

Petitioner,

vs.

MARK OWEN MCGUIRE,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of a claim essentially based in state law and already fully and fairly litigated in the state courts. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinions below. See *McGuire* v. *Estelle*, 902 F. 2d 749 (CA9 1990); *McGuire* v. *Estelle*, 919 F. 2d 578 (CA9 1990) (Kozinski, J., dissenting from rejection of rehearing en banc). They are summarized here to frame the issues in this brief.

Tori McGuire died at the age of six months of massive internal injuries. 919 F. 2d, at 578-579. Medical testimony indicated that she had been beaten to death in the culmination of a pattern of abuse: the "Battered Child Syndrome." *Id.*, at 580.

While petitioner Mark McGuire and his wife Daisy McGuire were waiting at the hospital, Mrs. McGuire asked petitioner what had happened. He stated that he guessed the baby had fallen off the couch. Later when Mrs. McGuire stated that McGuire was responsible, he made no reply. *Id.*, at 583. McGuire repeated his "fell off the couch" story to the police. When they informed him that the medical evidence was inconsistent with that story, he said "maybe some Mexicans came in while I was upstairs." *Id.*, at 581.

Mrs. McGuire testified under transactional immunity, but testified that she was the one who had beaten the baby. 902 F. 2d, at 751-752. The testimony was both internally inconsistent and inconsistent with other evidence. 919 F. 2d, at 584. There was evidence that McGuire had previously assaulted his wife. Pet. Cert. A-64, A-65.

Defense counsel requested a jury instruction on involuntary manslaughter, stating "my contention is that whoever killed the baby or hit the baby had no malice, had no intent to kill the baby." The instruction was given. 919 F. 2d, at 581-582, n. 4.

The state appellate court affirmed in an unpublished opinion, holding that the evidence was relevant and admissible under state law. Pet. Cert. A-64 to A-66. The state supreme court denied discretionary review. The federal district court denied habeas corpus. 902 F. 2d, at 752.

The Court of Appeals reversed, finding a constitutional defect in the admission of evidence which it considered irrelevant, but which the state court had decided was relevant under state law. See 902 F. 2d, at 753-754.

SUMMARY OF ARGUMENT

The state court's resolution of the state law evidence question is correct. More importantly, however, that determination is binding on a federal court considering the case on habeas corpus.

Where no specific federal right is involved, there is no existing Supreme Court precedent to the effect that relevance of evidence is a federal question. Any rule to that effect would be a new rule, which may not be made on habeas corpus, with exceptions not applicable here.

ARGUMENT

I. The state court ruling is binding on the state law question.

A. The State Law Question.

In the subsequent sections of this part I, we will show that the state court ruling is binding and not open for reconsideration in federal court. To place the issue in perspective, however, we will describe the question and the California law on the point.

1. Admissibility.

Uncharged misconduct evidence is a complex subject worthy of an entire treatise. See, *e.g.*, E. Imwinkelried, *Uncharged*

Misconduct Evidence § 1.04 (1984).[2] The general rule, however, is simply stated. Under the "inclusionary" view adopted by the California Evidence Code, relevant evidence of uncharged misconduct is admissible unless its *only* relevance is to show defendant's character and to use that character to infer his conduct. *People* v. *Thompson*, 27 Cal. 3d 303, 317, 611 P. 2d 883 (1980); cf. Imwinkelried, § 2.30 (main vol. and 1990 Supp.) (federal rule in accord). If the evidence is relevant through *any* chain of logic not passing through the forbidden character link, it is not barred by the character evidence rule. *Ibid.*; Imwinkelried, § 2.31. It is still subject to discretionary exclusion if prejudice outweighs probative value, however. *Thompson*, at 318; Cal. Evid. Code § 352; cf. Fed. Rule Evid. 403.[3]

The general rule is that evidence is admissible if and only if it is relevant. Cal. Evid. Code §§ 350, 351. The definition of relevance is therefore critical. " 'Relevant evidence' means evidence . . . having *any* tendency in reason to prove or disprove any *disputed* fact that is of consequence to the determination of the action." § 210 (emphasis added). This definition is essentially the same as Fed. Rule Evid. 401 except for the requirement that the fact be disputed. The omission of that requirement from the federal rule is intentional. See Advisory Committee Note to Fed. Rule Evid. 401; 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5164, at 43-47 (1978).

Uncharged misconduct evidence, like other prosecution evidence in c..ninal cases, is used for four purposes: (1) to establish that the criminal act was committed; (2) to establish that the defendant committed it; (3) to establish that he had the mental state making that act a crime; and (4) to disprove

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2. Cited below as "Imwinkelried."

3. Parallel federal rules are cited in this part as a convenient shorthand for familiar principles. The citations are not meant to imply that California is obligated to conform.

affirmative defenses raised by the defendant. See Imwinkelried, *supra* note 2, § 3.01, at 3. Evidence is relevant if it has *any* tendency in reason to prove or disprove any of these facts which may be "disputed."

Although the Evidence Code applies to both civil and criminal cases, Cal. Evid. Code §§ 12, 105, procedural differences between the two types of cases have a strong effect on what is "disputed." A civil defendant files an answer which admits any material allegation not denied. Cal. Code Civ. Proc. § 431.20. The plaintiff can further require affirmative admissions or denials by serving requests for admission. *Id.*, § 2033. Criminal cases have neither of these winnowing procedures. A defendant who pleads not guilty "puts in issue every material allegation of the accusatory pleading. . . . " Cal. Pen. Code § 1019.

> "There is no merit in the contention of defendant that until he puts in issue either identity, intent or other fact the People may not anticipate this and present evidence of other acts in their case in chief. It is not necessary for the defendant to raise issues before the People may meet them where this is part of the prosecution's burden. The People have the burden of establishing intent and identity." *People* v. *Archerd*, 3 Cal. 3d 615, 639, 477 P. 2d 421 (1970).

American courts are divided over whether a defendant can avoid the introduction of uncharged misconduct evidence by not disputing the fact in question. See Imwinkelried, *supra* note 2, § 8.10, at 22. Courts are further divided on what the defendant needs to do to remove a fact from dispute.

Imwinkelried identifies a spectrum of five situations ranging from the strongest case for excluding the evidence to the weakest. *Id.*, § 8.10, at 23. In the first situation, the defense expressly offers to stipulate to the fact which the evidence is offered to prove. While some courts do not require the prosecution to accept the stipulation in lieu of the evidence, 22 Wright & Graham, *supra*, § 5194, at 198-199, the majority do. Imwinkelried, § 8.11, at 25-26. California is in the majority.

People v. *Hall*, 28 Cal. 3d 143, 152, 616 P. 2d 826 (1980).[4]

The second situation is where the defendant testifies and expressly admits the fact but does not enter into a formal stipulation. Imwinkelried, *supra* note 2, § 8.12, at 28-29. In most cases it would seem to be splitting hairs to distinguish this case from the first. Thus in *People* v. *Tassel*, 36 Cal. 3d 77, 679 P. 2d 1 (1984), a defendant on trial for rape removed identity from dispute by testifying, admitting identity and intercourse, and claiming consent. *Id.*, at 81-82, 88-89. The essential question is whether the stipulation or testimony gives the prosecution everything it could legitimately have sought to obtain by introducing the evidence. If not, the prosecution can still introduce its evidence. See, *e.g.*, *People* v. *Edelbacher*, 47 Cal. 3d 983, 1007, 766 P. 2d 1 (1989) (inadequate offer to stipulate); *Hall*, *supra*, 28 Cal. 3d, at 152-153.

The third situation is where the defendant offers no evidence one way or the other on the issue. Imwinkelried, § 8.13, at 30. Under *Archerd* and *Hall*, California does not recognize mere passivity as removing the issue from dispute. At least one respected commentator agrees. See 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[09], at 404-64 (1990) (criticizing a contrary federal evidence case).

To raise the contrary view in this situation to a constitutional mandate would be an absurd contradiction. The defendant has a constitutional right to sit back and require the prosecution to prove every element beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 364 (1970). The state is forbidden to allow the prosecution the benefit of a presumption in carrying that burden, *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979), even if the presumption is deeply rooted in both common sense and common law. Compare *Sandstrom*, at 513 with *Agnew* v. *United States*, 165 U. S. 36, 49-50 (1897).

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4. There is now an exception, not pertinent here, where a prior felony conviction is an element of the new offense. Cal. Const. art. I, § 28(f).

To declare a constitutional rule that lack of an express denial removes an issue from dispute would be to overrule *Winship* and *Sandstrom*. California is well within constitutional bounds in refusing to consider an issue undisputed in Imwinkelried's third situation. This same conclusion necessarily follows for his fourth and fifth situations, which are even weaker cases for the defense.

With this foundation, we can examine the relevance of the "battered child syndrome." The first reported California case admitting evidence of the syndrome is *People* v. *Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971), a case quite similar to the present case. As in this case, Jackson was accused of beating his child. *Id.*, at 505-506.[5] "The defense was a denial on the part of the defendant that he had beaten the child and an effort to cast suspicion on the child's maternal grandmother and maternal aunt who took care of the child from time to time." *Id.*, at 508. The *Jackson* court had this to say about the syndrome:

> "A finding, as in this case, of the 'battered child syndrome' is not an opinion by the doctor as to whether any particular person has done anything, but, as this doctor indicated, 'it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of time that we had' by accidental means. In other words, the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. *The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason*. Only someone regularly 'caring' for the child has the continuing opportunity to inflict these

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5. Fortunately for the child, there was one important difference: he survived.

types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months." *Id.*, at 507 (emphasis added).

Remembering that evidence is relevant if it makes *any* change at all in the probability that a disputed fact is true,[6] the battered child syndrome is therefore relevant to three facts the prosecution must prove in its case in chief. First, it increases the probability that the child died at the hands of another and not by falling off the couch, etc. Second, it tends to establish that the batterer committed the crime with the *mens rea* of malice aforethought. That is, he did not act in the heat of sudden passion, see Cal. Pen. Code § 192(a) (voluntary manslaughter), or unintentionally cause death in the commission of misdemeanor child abuse, see *id.* § 192(b) (involuntary manslaughter); *id.*, § 273a (child abuse).

Third, and most importantly, the syndrome evidence has a tendency to narrow the class of suspects. Without this evidence, the suspects include the entire world. Even McGuire's bigoted lie that "maybe some Mexicans came in while I was upstairs," *McGuire* v. *Estelle*, 902 F. 2d 749, 751 (CA9 1990), is not entirely impossible. If an item of evidence narrows the class of suspects from the entire world to the small class of "caretakers,"[7] then the probability that any one member of that class is the culprit is greater than the probability would have been without that item.

Imwinkelried categorizes this kind of evidence as "possession of capacity suited to the commission of the charged crime." Imwinkelried, *supra* note 2, § 3.03, at 5. "This theory is widely recognized in the case law." *Ibid.*

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6. "A brick is not a wall." C. McCormick, *Evidence* § 185, at 543 (Cleary 3d ed. 1984).

7. Like the *Jackson* court, we use the admittedly inappropriate term "care" for lack of a better one.

"The theory of logical relevance is straightforward. If the issue is the defendant's identity, under Federal Rule of Evidence 401[8] any evidence slightly increasing the probability of the defendant's identity is material. At the outset of the case, there is a zero probability. By establishing the defendant's possession of a capacity suited for the commission of the crime, we slightly increase the likelihood of the defendant's identity. Some persons may not possess that capacity, and by distinguishing the defendant from those persons, the prosecutor raises the probability of the defendant's identity and guilt. To trigger this theory, the capacity cannot be one shared by the entire population. The ability must serve to discriminate between the defendant and other persons who might have committed the crime." *Id.*, at 5-6 (footnotes omitted).

The "capacity" in this case is regular access to the child. See *Jackson*, *supra*, 18 Cal. App. 3d, at 507.[9] This conclusion is a direct logical inference of probability, without passing through the forbidden inference of conduct from character. See generally Imwinkelried, *supra* note 2, §§ 2.18-2.20, at 47-54.

Under *People* v. *Hall*, *supra*, and *People* v. *Edelbacher*, *supra*, defendant could have eliminated the relevance under the above theory only by stipulating to *everything* the prosecution could legitimately seek to establish by the evidence. He would have to stipulate that (1) Tori died by force and not by accident; (2) the person who killed Tori did so with malice aforethought and not any lesser mental state; and (3) the person who killed Tori was a member of the household, *i.e.*, either McGuire or his wife. Nothing less will serve to make the evidence irrelevant under section 210. No such stipulation was offered, and in fact defendant requested and received man-

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8. Or under Cal. Evid. Code § 210. See *supra* p. 4.

9. Quoted *supra* pp. 7-8.

slaughter instructions. See *McGuire* v. *Estelle*, 919 F. 2d 578, 581-582, n. 4 (CA9 1990) (Kozinski, J., dissenting from rejection of rehearing en banc).

2. Jury instruction.

The Court of Appeals found that the Fourteenth Amendment prohibited the giving of this instruction in this state criminal case:

> "Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, *if believed*, was not received, and may not be considered by you to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you *only* for the *limited* purpose of determining *if* it tends to show three things:
>
> "1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
>
> "2. To establish the battered child syndrome, and
>
> "3. Also a connection between the other two offense (sic) and the one of which the defendant is accused so that it may be logically concluded that *if* the defendant committed other offenses, he also committed the crime charged in the case. *You are not permitted to consider [the] evidence for any other purpose*." 902 F. 2d, at 754-755 (emphasis altered).

The language of paragraph 3 is taken directly from California case law, where it has a long history.[10] The language goes back at least 79 years. "It is held by all the authorities that, whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible." *People* v. *Burke*, 18 Cal. App. 72, 98 (1912).

This long line of cases was approved in *People* v. *Cramer*, 67 Cal. 2d 126, 130, 429 P. 2d 582 (1967). *Cramer* itself was later disapproved only to the extent that it authorized prior misconduct evidence to prove a point not in dispute. See *Tassell*, *supra*, 36 Cal. 3d, at 89, n. 8. The portion of the instruction in question here involves use of the evidence to prove identity, and identity is very much in dispute in this case.

The jury was not told that the prior acts proved McGuire committed the present offense. They were told that the evidence was submitted to them in order for *them* to determine whether that inference could be drawn. They were not told that McGuire committed the prior acts; the instruction qualified the submission with the words "if believed."

California cases have found particularly strong probative value in prior crimes against the same victim. They have held that such evidence is admissible to show identity and is not prohibited by the state's character evidence rule. See, *e.g.*, *People* v. *Zack*, 184 Cal. App. 3d 409, 413-415, 229 Cal. Rptr. 317 (1986). As noted earlier, battered child syndrome is strong evidence that Tori died as part of a continuing pattern of abuse. The jury was correctly instructed that *if* they believed McGuire was the abuser, they could consider that evidence as tending to show that he was also the perpetrator of

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10. Whether the instruction is a "misreading" of CALJIC 2.50, see 902 F. 2d, at 755, n. 2, is immaterial. CALJIC is neither a statute nor a rule of court, but only a recommendation of a committee of the Superior Court of one county. See 1 *Cal. Jury Instructions — Criminal* vii-ix (5th ed. 1988).

the present offense. The instruction was phrased in accordance with California law.

But was there enough evidence linking defendant to the prior acts to instruct the jury on that theory? Identity of the defendant as the actor in the prior act is a preliminary fact for determination by the jury. Cal. Evid. Code § 403; see *People* v. *Simon*, 184 Cal. App. 3d 125, 131, 228 Cal. Rptr. 855 (1986); cf. *Huddleston* v. *United States*, 485 U. S. 681, 689-690 (1988). The trial judge need only determine if the evidence was sufficient to sustain a jury finding of proof by a preponderance of the evidence. *Simon*, 184 Cal. App. 3d, at 134; cf. *Huddleston*, 485 U. S., at 690.

The battered child syndrome by itself raises the probability that McGuire was the batterer to very nearly fifty percent, because only two people were "taking care" of Tori. 919 F. 2d, at 584, n. 7 (Kozinski, J., dissenting). When McGuire's habit of rough treatment, *ibid.*,[11] Mrs. McGuire's habit of gentle treatment, *ibid.*, and the patent falsity of Mrs. McGuire's immunized "confession," *id.*, at 584, are added, the evidence is more than sufficient to go to the jury.

Amicus does not submit the foregoing analysis as absolutely conclusive of the state law question. An argument can be made for the other side. We submit this analysis to demonstrate that the relevance and instruction issues are "susceptible to debate among reasonable minds." Cf. *Butler* v. *McKellar*, 108 L. Ed. 2d 347, 356, 110 S. Ct. 1212, 1217 (1990).

The state court decision of the question is a different matter. "Until reading the panel's opinion, I had thought the federal courts were bound by state court interpretations of the state rules of evidence." 919 F. 2d, at 580 (Kozinski, J., dissenting). Indeed they are.

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11. Unlike character, habit is admissible to show conduct. Cal. Evid. Code § 1105, cf. Fed. Rule Evid. 406.

B. Previously Decided State Questions.

Frequently, questions of federal law are related to questions of state law. The resolution of one may depend on the other, or the resolution of one may make resolution of the other unnecessary.

A long, stormy battle has swirled around the question of when a state *procedural* rule may preclude a decision on the merits of a federal question. A complex body of law has developed concerning when such a bar is "independent," see *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), when it is "adequate," compare *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988) with *Dugger* v. *Adams*, 489 U. S. 401, 410-412, n. 6 (1989), and when the federal court may reach the merits despite an adequate and independent state procedural bar, see *Brown* v. *Allen*, 344 U. S. 443, 486-487 (1953) (absolute bar); *Fay* v. *Noia*, 372 U. S. 391, 438 (1963) ("deliberate bypass" only); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) (cause and prejudice); *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) (actual innocence).

By comparison to these stormy waters, the doctrine regarding prior state decisions of *substantive* law has been a pool of serenity. The state court decision is simply not reviewable on such questions. See *Henry* v. *Mississippi*, 379 U. S. 443, 446-447 (1965) (distinguishing procedural from substantive questions).

> "As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is *immune* from review in the federal courts. *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935); *Murdock* v. *Memphis*, 20 Wall [87 U. S.] 590 (1875). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner *or are in themselves dispositive of his case*." *Sykes*, *supra*, 433 U. S., at 81 (emphasis

added in part).

Dugger v. *Adams*, 489 U. S. 401 (1989) is an example of a federal question which is dependent on a state question. After Adams' trial and appeal, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) "held that remarks by a prosecutor in a capital case that misinformed the jury as to the role of appellate review violated the Eighth Amendment." *Adams*, 489 U. S., at 405.

Adams challenged, as *Caldwell* error, statements made by the trial judge regarding the roles of the judge and jury in the Florida sentencing procedure. *Ibid.* He had not objected at trial, however, and the state courts held the claim to be barred. *Ibid.*

In reversing the grant of federal habeas corpus, *Adams* noted a "critical fact" about *Caldwell* error. *Caldwell* only applies if the comments are, in fact, an incorrect statement of *state* law. A federal habeas court cannot decide the federal question without first answering a state question. If the comments were accurate, there is no federal question. See *id.*, at 407-408.

Discussing the lack of cause, the *Adams* Court said this:

> "Had respondent objected at the time and asserted error under state law, and had the trial or appellate court sustained his objection, the error would have been corrected in the state system. Had his objection been overruled and that ruling sustained on appeal, *we would very likely know* that the instruction was an accurate reflection of state law. In either event, it is doubtful that the later decision in *Caldwell* would have provoked the filing of a second habeas corpus petition." *Id.*, at 408 (emphasis added).

This passage strongly implies that the state court ruling on the question would be absolutely binding on the federal habeas court. The federal courts would *know* the answer to the state question, not merely have guidance on it. It would be so clear that Adams' lawyer would probably not even include the

claim in the second petition.

In the dawn of our republic, one of Congress' first acts was to command the new federal courts to respect the outcome of state court proceedings. Act of May 26, 1790, ch. 11, 1 Stat. 122. This command is now codified, essentially unchanged, in 28 U. S. C. § 1738, para. 3: "[J]udicial proceedings [of a State] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Little has been said about this act in relation to habeas corpus. In the early days the writ was only available for jurisdictional attacks, *Ex parte Royall*, 117 U. S. 241, 248 (1886), and the general rule of nineteenth century procedure was that subject matter jurisdiction could always be collaterally attacked on habeas corpus. See R. Hurd, *Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 327-330 (2d ed. 1876). A federal court entertaining jurisdictional attack via habeas corpus was therefore giving the state judgment no less finality than the state's own courts would have given it.

Exceptions to the Full Faith and Credit Act "will not be recognized unless a later statute contains an express or implied repeal." *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 468 (1982). Implied repeals " 'are not favored' " and will be found only when " 'the intention of the legislature to repeal [is] clear and manifest.' " *Ibid.* (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976)).

Justice Frankfurter asserted in his concurring opinion in *Brown* v. *Allen*, 344 U. S. 443, 507-508 (1953) that Congress had commanded the federal habeas courts to review *de novo* questions of *federal* law which had already been considered by the state courts. This is a conclusion, in effect, that Congress partially repealed the Full Faith and Credit Act in the habeas corpus statute. This dubious proposition has been accepted ever since, see *Wainwright* v. *Sykes*, *supra*, 433 U. S., at 87, with one exception, see *Stone* v. *Powell*, 428 U. S. 465 (1976), and the present case is not an appropriate occasion to challenge it. See *Duckworth* v. *Eagan*, 106 L. Ed. 2d 166, 176, n. 3, 109

S. Ct. 2875, 2879, n. 3 (1989) (expansion of *Stone* not raised by parties). Nothing in *Brown* or any of the cases which followed it, however, suggests that the habeas statute in any way detracts from the respect due to the state court decision on questions of *state* law. *Sykes* and *Adams*, while not mentioning the Act, say just the opposite.

In California, when an evidentiary question has been resolved on appeal, that decision is final and cannot be relitigated on habeas corpus, even if the question is a constitutional one. See *In re Eli*, 71 Cal. 2d 214, 219, 454 P. 2d 337 (1969). Only questions going to the power of the court to impose the sentence can be relitigated on habeas corpus. See *In re Harris*, 49 Cal. 3d 131, 134, n. 2, 775 P. 2d 1057 (1989) (sentence greater than maximum on undisputed facts). The present case involves no such issue. The state judgment on the state question is final. The evidence in question is "relevant" within the meaning of section 210 of the California Evidence Code, and it is not excludable under the state's character evidence rule.

C. The Federal Questions.

The federal questions must be shaped by this binding determination of *state* law. The questions are these. *Given* that the evidence is relevant under *state* law, and *given* that it is not excluded by the *state's* character evidence rule: (1) Is exclusion nonetheless required by the Constitution of the United States? (2) Did the jury instruction violate some federal constitutional right? If neither, habeas does not lie. See *Engle* v. *Isaac*, 456 U. S. 107, 121, n. 21 (1982).

Two possible theories are suggested by the Court of Appeals' opinion. First, the court seems to imply that there is a federal constitutional standard of relevance superimposed on top of state law which prohibits introduction of evidence

deemed relevant under state law. 902 F. 2d, at 753-754.[12] Second, the court implicitly suggests that there is a federal constitutional rule regarding how juries may be instructed to use uncharged misconduct evidence. 902 F. 2d, at 754-755.

Because this is a federal habeas corpus case, a threshold question precedes these questions. Are either of these asserted rules "new rules" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989)?[13] If so, the writ does not lie. A rule is "new" even though it merely raises to federal constitutional stature a previously established rule of state law. "Federal habeas corpus serves to ensure that state convictions comport with *federal* law that was established at the time the petitioner's conviction became final." *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 209-210, 110 S. Ct. 2822, 2830 (1990) (emphasis in original).

When is a new federal rule "established"? The *Teague* cases have never said explicitly, but they have said implicitly. We will return to this question in part III. First, we will survey existing authority on the federal questions stated above.

II. There is no existing Supreme Court precedent to support either of the Court of Appeals' theories.

A. A Federal Standard of Relevance.

Part II. A. of the opinion below finds a federal constitutional violation in the admission of supposedly irrelevant evidence, without citing a single Supreme Court case. 902 F. 2d,

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12. The court was actually proceeding on the assumption that the evidence was *not* relevant under state law. See 919 F. 2d, at 580 (Kozinski, J., dissenting from denial of rehearing). As we have already shown, that question is not on the table.

13. This Court has previously considered *Teague* questions *sua sponte*. See *Penry* v. *Lynaugh*, 106 L. Ed. 2d 256, 298, 109 S. Ct. 2934, 2963 (Stevens, J., concurring and dissenting).

at 753-754. The relevant portion of McGuire's brief in opposition to certiorari, Opp. Pet. Cert. 9-12, cites only cases of marginal relevance plus an out-of-context quote from *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). Amicus' own research has found only a few cases, and they point uniformly against the Court of Appeals' conclusion.

Lisenba v. *California*, 314 U. S. 219 (1941) involved claims of irrelevant and prejudicial evidence. It appears that this Court granted certiorari in *Lisenba* primarily to address the genuine federal question of the voluntariness of his confession. That issue comprises the bulk of the opinion, *id.*, at 229-241, and the entire dissent, *id.*, at 241-243 (Black, J.). The majority refers to the confession issue as "the important question" in the singular. *Id.*, at 229. Nonetheless, the *Lisenba* Court did address the other issues. The alternative of granting certiorari limited to the confession question was apparently impractical due to the confused state of Lisenba's *in forma pauperis* "appeal." See *id.*, at 222-223. The Court's terse disposition of those other issues is enlightening.

Lisenba, alias James, was accused of murdering his wife for the insurance money. *Id.*, at 223-224. His contention that the state court had misapplied its accomplice corroboration rule "need[ed] but brief notice." *Id.*, at 227. "The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice." *Ibid.*

The next contention was strongly similar to McGuire's contention in the present case. It seems that defendant's previous wife also died under suspicious circumstances. Evidence of the circumstances of that death was admitted, even though there was no proof that defendant had killed her. *Id.*, at 225, 227. The evidentiary question was the subject of a long analysis by the state supreme court. See *People* v. *Lisenba*, 14 Cal. 2d 403, 424-432, 94 P. 2d 569 (1939). The United States Supreme Court's *entire* discussion of the question was this:

> "Third. Testimony was admitted concerning the death of James' former wife, on the widely recognized prin-

> ciple that similar but disconnected acts may be shown to establish intent, design, and system.[9] *The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law.*

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[9] See 2 Wigmore, *Evidence*, 3d ed. § 363."

314 U. S., at 227-228 (emphasis added).

Lisenba also addressed the question of whether there is a federal standard of exclusion of prejudicial evidence. The prosecution had brought live rattlesnakes into the courtroom as part of its evidence of the bizarre conspiracy. Once again, the Court emphasized the difference between rules of evidence and the Due Process Clause.

> "We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification of the snakes so infused the trial with unfairness as to deny due process of law. The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process." *Id.*, 228-229.

Lisenba is therefore strong authority for two propositions. First, when evidence of prior misconduct is deemed relevant and admissible under state law, there is no federal rule for second-guessing that decision under the rubric of due process. Second, when evidence is relevant, there is no federal rule requiring its exclusion on the ground that it is inflammatory.

The next major case dealing with prior misconduct is *Spencer* v. *Texas*, 385 U. S. 554 (1967). At the time of Spencer's trial, Texas courts tried habitual criminal allegations together with the guilt determination. The jury was thus aware of the

irrelevant prior crime but was told to disregard it. *Id.*, at 555-556.

Spencer rejected the assertion that this procedure violated the Due Process Clause. Justice Harlan, writing for the majority, specifically rejected the idea that the due process cases "establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure." *Id.*, at 564. "As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 [1934]." *Ibid.*

Spencer's discussion distinguishing *Jackson* v. *Denno*, 378 U. S. 368 (1964) is particularly significant. *Jackson* involved procedures to guarantee a specific federal constitutional right: the privilege against self-incrimination. Federal procedural requirements were imposed to implement that specific federal right. *Spencer*, at 564-565. "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565.

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568-569.

Justice Stewart echoed a similar consideration in his concurrence. He emphasized that the Constitution did not give him "a roving commission to impose upon the criminal courts of Texas [his] own notions of enlightened policy." *Id.*, at 569. The fact that a federal judge may disagree with a procedure or the fact that federal courts may follow a different one is not sufficient to render it unconstitutional.

Burgett v. *Texas*, 389 U. S. 109 (1967) strongly restated the distinction between specific federal rights and the "general 'fairness' approach." One of the prior convictions in *Burgett* had been entered in a case where the defendant was not represented by counsel. *Id.*, at 112.[14] *Burgett* relied expressly on the holding of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) that the specific Sixth Amendment right to counsel was incorporated into the Fourteenth Amendment. 389 U. S., at 114. The *Burgett* Court quoted *Spencer* and distinguished it on this ground. *Id.*, at 115-116.

Most recently, this Court reaffirmed the principle of *Spencer* in *Marshall* v. *Lonberger*, 459 U. S. 422 (1983). "Central to our decision [in *Spencer*] was the fact that the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Id.*, at 438, n. 6.

B. Instruction on the Use of the Evidence.

The other federal question which the Court of Appeals purported to find in this case was the manner in which the jury was instructed to consider the evidence. 902 F. 2d, at 754-755. The antecedent *Teague* question is whether there is any Supreme Court precedent to support the notion that this is a federal constitutional question. The negative answer cannot be conclusively proven; we can only report that we have sought and we have not found. Cf. *Matthew* 7:7.

There is no shortage of Supreme Court cases scrutinizing jury instructions, to be sure. When an instruction is claimed to infringe a specific, identified federal right, the phrasing of the instruction is a federal question. A federal right regarding the burden of proof was identified in *In re Winship*, 397 U. S. 358 (1970). Consequently, a long line of cases from *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979) to *Yates* v. *Evatt*, pending

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14. The record of the prior conviction was somewhat ambiguous, *ibid.*, but the Court treated it as an uncounseled conviction. *Id.*, at 114-115.

case No. 89-7691, has examined burden-shifting instructions as a federal question. Similarly, the case law of capital punishment under *Furman* v. *Georgia*, 408 U. S. 238 (1972) and its progeny has made capital sentencing standards a federal question, with a resulting deluge of instruction cases. See, *e.g.*, *Boyde* v. *California*, 108 L. Ed. 2d 316, 327, 110 S. Ct. 1190, 1196 (1990). Where a federal rule of exclusion forbids consideration of the evidence for some purposes but not others, the jury instruction would be a key element in deciding the federal question of whether the use was properly limited. See, *e.g.*, *Oregon* v. *Hass*, 420 U. S. 714, 717 (1975) (impeachment with statement excluded under *Miranda*).

The present question is a horse of an entirely different color. The instruction in question dealt with the manner in which the jury was instructed to use the evidence after the judge found it admissible under state law. "Misuse" of the evidence by the jury would not infringe any specific federal right. We have found no Supreme Court case, and McGuire cites none, which renders such a question a federal question under a "general 'fairness' approach." *Cf. Burgett*, *supra*, 389 U. S., at 115.

C. Cases Cited by Respondent.

McGuire's Brief in Opposition to the Petition for Certiorari cites only two Supreme Court cases to support the notion that this case involves a due process issue. See Opp. Pet. Cert. 12, citing *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973); Opp. Pet. Cert. 13, citing *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977). Both cases actually support the opposite conclusion.

Lovasco rejected an assertion that delay in prosecution was a violation of the Due Process Clause even though two material witnesses had died in the interim. *Id.*, at 785-786, 796-797. The phrase cited by McGuire, "fundamental conceptions of justice which lie at the base of our civil and political institutions," occurs in a passage explaining that the delay in *Lovasco* was *not* fundamental. *Id.*, at 790. The phrase is taken from *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), where the

alleged due process violation was the use of perjured testimony *known* by the prosecution to be perjured at the time it was introduced. Neither the delay in *Lovasco* nor the evidence in this case comes close to such a blatant fraud on the judicial process.

Both the Court of Appeals and McGuire quote *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973) out of context for the proposition that a federal constitutional violation occurs when an error "so infected the entire trial that the resulting conviction violates due process." See *McGuire*, *supra*, 902 F. 2d, at 755; Opp. Pet. Cert. 12. Misused in this manner, *Naughten* is asserted as authority for precisely the "roving commission" disclaimed by Justice Stewart in *Spencer*. See *supra* p. 20. *Naughten* holds nothing of the sort.

Naughten involved a claim along the lines of what would later be called "*Sandstrom* error." See *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). The jury had been instructed that witnesses were rebuttably presumed to tell the truth. 414 U. S., at 142. Naughten's contention was that a presumption of truthfulness of prosecution witnesses shifted the burden of proof to him. *Id.*, at 144.

The *Naughten* Court began by noting, in words highly pertinent here, the difference between appeal in a unitary jurisdiction and collateral attack on federal habeas corpus.

> "Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Id.*, at 146.

Naughten then goes on to consider the challenged instruction in the context of the entire trial. This is the full quote from which the phrase in question is lifted:

> "But the trial court gave, not once but twice, explicit instructions affirming the presumption of innocence and declaring the obligation of the State to prove guilt beyond a reasonable doubt. The Court of Appeals, recognizing that these other instructions had been given, nevertheless declared that 'there was no instruction so specifically directed to that under attack as can be said to have effected a cure.' 476 F. 2d, at 847. But we believe this analysis puts the cart before the horse; the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.*, at 147.

The *Naughten* Court thus conceded that the instruction was "ailing." Viewed in isolation, it might lead the jury to a conclusion contrary to the defendant's federal right to proof beyond a reasonable doubt under *In re Winship*, 397 U. S. 358 (1970). Due process was not violated, however, because in the context of the entire trial it was unlikely that the jury would have interpreted the instructions as a whole that way. See *Naughten*, at 149; see also *Boyde* v. *California*, 108 L. Ed. 2d 316, 329, 110 S. Ct. 1190, 1198 (1990).

Before any discussion about an infection spreading to the entire trial is in order, there must first *be* an infection. That is, there must be some specifically identified *federal* right which is infringed. In *Naughten* it was the *Winship* right to make the prosecution carry its burden of proof. In *Boyde* it was the federal right to have a capital jury consider whatever character evidence defendant proffers. See *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). In *Burgett*, *supra*, it was the *Gideon* right to counsel. In *Lisenba*, *Spencer*, and the present case there is only the "general 'fairness' approach," which has never been sufficient to second-guess the state courts on mere evidentiary matters otherwise entrusted to state law.

D. Court of Appeals Cases.

The Court of Appeals cited three cases for the proposition that admission of supposedly prejudicial evidence in a state trial constitutes a federal constitutional violation. All three predate *Teague*; all three disregard the limitations of federal jurisdiction; all three are wrongly decided. More importantly, however, these cases are *not* binding authority on the state courts.

The first case is *Bisaccia* v. *Attorney General*, 623 F. 2d 307 (CA3 1980). A co-conspirator's guilty plea had been introduced as evidence. The New Jersey Supreme Court rejected Bisaccia's Confrontation Clause argument on the ground that cross-examination was available. *Id.*, at 308-309.

On habeas corpus, Bisaccia made the additional claim that use of the guilty plea was due process violation. The Third Circuit began with a dubious analysis of the exhaustion requirement. *Id.*, at 309-312. It then proceeded to the merits.

The *Bisaccia* majority first acknowledged the "well-established principle that evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Id.*, at 312, citing *Donnelly* v. *De Christoforo*, 416 U. S. 637, 642-643 (1974). Having stated this principle, the majority proceeded to ignore it.

The majority first quoted at length from a 1949 federal case on ordinary evidence law. It then decided that because the rule was based on "fairness" any state action following a different rule "challenges our concept of due process." 623 F. 2d, at 312-313. The majority cited in support two Seventh Circuit cases. *Id.*, at 313. The Supreme Court's statement in *Spencer* v. *Texas*, see *supra* p. 20, that a "general 'fairness' approach" does *not* permit the imposition of federal practice on the states, is not mentioned.

Chief Justice Sitz recognized the majority's error. He concurred in the result based on what he saw as a violation of a specific provision of the Bill of Rights: the Confrontation Clause. *Id.*, at 315.

Osborne v. *Wainwright*, 720 F. 2d 1237 (CA11 1983) went a step further and turned controlling Supreme Court authority on its head. The claim was that gruesome photographs were unduly prejudicial, *id.*, at 1238, and Lisenba's rattlesnakes formed the obvious precedent. See *supra* p. 19. The *Osborne* Court read *Lisenba* as considering but rejecting Lisenba's claim that the evidence was unduly prejudicial *in his case*. 720 F. 2d, at 1238, n. 1. As we described earlier, the *Lisenba* holding is not so narrow. *Lisenba* categorically rejected the entire notion that the shocking nature of relevant evidence could *ever* "for that reason alone, render its reception a violation of due process." *Lisenba* v. *California*, 314 U. S. 219, 229 (1941).

The last and worst of the group is *Dudley* v. *Duckworth*, 854 F. 2d 967 (CA7 1988). The *Dudley* majority makes this incredible statement, *id.*, at 970 (emphasis added):

> "As the petitioner recognizes, the admissibility of evidence is generally a matter of state law. [Citations.] A writ of habeas corpus should issue, however, when an erroneous evidentiary ruling 'is of such magnitude that the result is a denial of fundamental fairness.' [Citations.] In determining whether a writ should issue, the court must determine 'whether the probative value of the evidence outweighs the prejudice to the accused.' [Citations.][6]
>
> ---
>
> [6] *This standard is parallel to the standard of review in a direct appeal.* [Citations.]"

The citations in this passage are all circuit cases. Without citing a single Supreme Court precedent, *Dudley* pays mere lip service to the difference between habeas and direct review and then proceeds to apply exactly the same standard as it would apply to a direct appeal from a *federal* conviction.

And what was the egregious, fundamental error that supposedly reduced Dudley's trial to a travesty of justice? To explain why he was nervous, a witness revealed that he had received anonymous threats. *Id.*, at 969. The state supreme court had held this proper, and the federal district judge found "it was a very small incident in a fairly lengthy proceeding." *Id.*, at 970. Yet the federal appellate court found a violation of the Fourteenth Amendment. *Id.*, at 972.

Why do we even *have* state appellate courts? If those courts cannot be trusted to finally decide mundane evidentiary questions such as this one, we might as well shut them down and remove all criminal appeals directly to the federal circuits.

Is "due process" a legal amoeba? Can it change its shape at will to reach out and absorb any question of law on which a federal court disagrees with a state court? The precedents of this Court are uniformly to the contrary. "Fundamental fairness" is violated only in the case of truly egregious abuses such as mob-dominated trials and knowing use of perjured testimony. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544, n. 8 (1982) (Stevens, J. dissenting).

Federal habeas corpus exists to protect the rights of the individual against the state. But the law-abiding people of the state have rights, too. They have the right to execute their criminal judgments absent a valid basis for federal interference. See *Demosthenes* v. *Baal*, 109 L. Ed. 2d 762, 769, 110 S. Ct. 2223, 2226 (1990). The three cases discussed above demonstrate that the people's rights are being violated with shocking frequency.

The judgment in the present case could be reversed with a single statement that the supposed "error," if it is error at all, is not "fundamental" enough to rise to the level of a due process violation. Experience demonstrates, however, that such a vague standard is not sufficient to hold the line on overzealous interference with state proceedings. Stronger medicine is needed. That medicine, amicus submits, is *Teague* v. *Lane*.

III. Every rule is "new," for the purpose of *Teague* v. *Lane*, until it is adopted by the Supreme Court.

In *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality), this Court established that, with rare exceptions not applicable here, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310; *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2944, 106 L. Ed. 2d 256, 274 (1989).

Announced by whom? The Court's treatment of Teague's claim leaves no doubt, if indeed there had been any, that a rule is "new" when it is announced by the Supreme Court, no matter how long ago lower courts may have accepted the argument.

Teague's contention was "that the Sixth Amendment's fair cross section requirement applies to the petit jury." *Id.*, at 299. This was hardly a novel argument. It had been accepted by the California Supreme Court over a decade earlier, albeit under a cognate provision of the state constitution. *People* v. *Wheeler*, 22 Cal.3d 258, 276-277, 583 P.2d 748 (1978). Two federal circuits had upheld claims similar to Teague's. *Booker* v. *Jabe*, 775 F. 2d 762, 767-771 (CA6 1985), *vacated sub. nom. Michigan* v. *Booker*, 478 U.S. 1001 (1986), *opinion reinstated*, 801 F. 2d 871 (1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray* v. *Abrams*, 750 F. 2d 1113, 1130-1131 (CA2 1984), *vacated sub. nom. Abrams* v. *McCray*, 478 U.S. 1001 (1986); *Roman* v. *Abrams*, 822 F. 2d 214, 225 (CA2 1987) (reaffirming *McCray*).

These lower court authorities had been briefed to the *Teague* Court, see Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 13, but they made no difference to the Court's analysis. Announcing that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final," 489 U. S., at 301 (italics in original), the Court looked only at its *own* precedents in making that determination. *Ibid.*

If *Booker* v. *Jabe* and *McCray* v. *Abrams* did not save the rule Teague sought from classification as a "new rule," then

what is the effect of the three circuit court cases relied on by the Court of Appeals in the present case? The answer is the same; they have no effect. That is as it should be.

The Supreme Court is unique among federal courts. It is the only federal court with direct appellate jurisdiction to review state judgments. 28 U. S. C. § 1257. "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 296 (1970). State courts therefore have no obligation under the doctrine of stare decisis to follow precedents established by the lower federal courts. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[1] at 23 (2d ed. 1988).

The basic question under *Teague* is whether, "[f]rom the point of view of a state court considering petitioner's claim at the time his conviction became final," *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 208, 110 S. Ct. 2822, 2828 (1990), prior decisions "compel the rule that [petitioner] seeks." *Id.*, at 207, S. Ct., at 2828, quoting *Saffle* v. *Parks*, 108 L. Ed. 2d 415, 426, 110 S. Ct. 1257, 1261 (1990). A decision by a court of coordinate jurisdiction which is not binding precedent cannot compel a result which is not already compelled by the Supreme Court precedent itself. Quite the contrary, *Butler* v. *McKellar*, 108 L. Ed. 2d 347, 356, 110 S. Ct. 1212, 1217-1218 (1990) noted that disagreement among lower courts, both state and federal, was a strong indication that the new rule was *not* dictated by the earlier Supreme Court precedent.

The conclusion follows that the decision of whether a rule is "new" under *Teague* must be made by looking solely to decisions of the Supreme Court. Opinions from the lower federal courts, including the court hearing the habeas case, cannot dictate the result in a state court and hence cannot exempt the rule from the proscription of *Teague*. The new rule principle permits a state court to disagree in good faith with a lower federal court on an unsettled question of federal law without having its judgment set aside on habeas corpus. See *Butler*, *supra*, 108 L. Ed. 2d, at 356, 110 S. Ct., at 1217.

When the decision of the California Court of Appeals in this case became final, there was no precedent binding on it which compelled the conclusion that either the evidence or the instruction violated the Fourteenth Amendment. Both exceptions to the *Teague* rule, see 489 U. S., at 311-313, are clearly inapplicable. Estelle's custody of McGuire pursuant to an affirmed judgment of a court of competent jurisdiction is therefore not "in violation of the Constitution or laws or treaties of the United States" within the meaning of 28 U. S. C. § 2254.

CONCLUSION

The decision of the Court of Appeals should be reversed, and the decision of the District Court denying habeas corpus should be reinstated.

Dated: April, 1991

Respectfully submitted,

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(7)

No. 90-1074

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

WAYNE ESTELLE, WARDEN,

Petitioner,

v.

MARK OWEN McGUIRE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION SUPPORTING RESPONDENT

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No. 90-1074

In The

Supreme Court of the United States

October Term, 1990

WAYNE ESTELLE, WARDEN,

Petitioner,

v.

MARK OWEN McGUIRE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION SUPPORTING RESPONDENT

INTEREST OF *AMICI CURIAE*

Both the petitioner and the respondent have consented to the participation of the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association as *amici curiae* in this case. Their letters of consent are on file with this Court.

I. National Association of Criminal Defense Lawyers.

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers. The NACDL was founded over twenty-five years ago to promote, study and advance the knowledge of criminal defense law, and to encourage the integrity, independence and expertise of defense lawyers.

Among the NACDL's stated objectives is to promote the proper administration of criminal justice. Consequently, the NACDL is concerned with protecting individual rights and with improving criminal law, its practices and procedures. This organization strives to protect both an individual's Fourteenth Amendment right to a fundamentally fair trial and the ability to enforce this right through the remedy of federal habeas corpus. The NACDL is very concerned about any decision that would undermine or dilute either this constitutional guarantee or the mechanism to enforce the guarantee, as would adopting the position taken by the petitioner in this case.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the issues are so important to defense lawyers and persons accused of criminal offenses throughout the nation that the NACDL should offer its assistance to the Court.

II. National Legal Aid and Defender Association.

The National Legal Aid and Defender Association (NLADA) was formed in 1911 and is a private, non-profit, national membership organization headquartered in Washington, D.C. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. The NLADA represents

approximately 774 defender and assigned counsel offices providing legal services to poor people accused of criminal offenses. The membership of the NLADA comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel and other private practitioners.

The NLADA is vitally interested in protecting the fundamental rights of poor persons accused of crimes. The organization is greatly concerned that narrowing the reach of habeas corpus, as requested by the petitioner in this case, would result in the denial of fundamentally fair trials to many indigent people accused of criminal offenses.

SUMMARY OF ARGUMENT

A central purpose of the Fourteenth Amendment's Due Process Clause is to ensure that every person accused of a crime receives a fundamentally fair trial. Mark McGuire was denied such a trial. He was convicted because of the admission of pure propensity evidence. Every common law jurisdiction has declared that convictions based on propensity evidence are anathema to the fair administration of justice.

The basic legal standard that governs this case is not in dispute. The petitioner, the respondent, and the United States (as *amicus curiae*) all agree that the Due Process Clause guarantees the right to a fundamentally fair state criminal trial. The only real dispute in this case is whether evidence as to propensity was admitted in Mr. McGuire's trial and, if so, whether this evidence as emphasized by an improper jury instruction made the trial fundamentally unfair, in violation of the Due Process Clause.

This brief focuses primarily upon the character rule, which is the common law prohibition against the introduction of pure propensity evidence. The rule is vital to a fair trial; people must be tried for what they do, not who they are. The rule against propensity evidence has been applied consistently in every common law jurisdiction since at least the middle of the seventeenth century, and it has been adopted in each of the United States. The history, prominence, and purpose of the character rule demonstrate that it is fundamental to a fair trial. Therefore, a transgression of the character rule is not merely an error of state law; if the introduction of propensity evidence is sufficiently prejudicial it amounts to a deprivation of a fair trial. The court of appeals found such a constitutional error in Mr. McGuire's case and correctly granted relief.

The constitutional error in this case, the denial of a fundamentally fair trial, is cognizable on habeas corpus. Habeas corpus is the proper remedy for obtaining freedom from imprisonment when defendants, such as Mr. McGuire, have not received a fair trial.

ARGUMENT

I. The Due Process Clause Prohibits Convictions Based upon Propensity Evidence.

A. The Fourteenth Amendment guarantees criminal defendants a fundamentally fair trial.

State criminal defendants are entitled to a fair trial. "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (citations omitted).[1] To

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[1] *See also Committee Report and Proposal, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of*

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implement this right, rules that are "fundamental and essential to a fair trial" are made obligatory on the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942). The Court has held that rules are fundamental when they are central to Anglo-American jurisprudence, as evidenced by the common law tradition, by the Constitution, or by the application of those rules by state and federal courts.

Some fundamental protections are reflected in the Bill of Rights and are made applicable to the states through the Fourteenth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

This Court has also held, on many occasions, that the Fourteenth Amendment requires certain procedures that are fundamental, though they are not specifically included in the Bill of Rights. For example, in *In Re Winship*, 397 U.S. 358 (1970), the Court invalidated a state statute that allowed minors to be found delinquent based upon a mere preponderance of evidence. The Court found that "[t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every [element of the offense]." *Id.* at 365. Similarly, in *Thompson v. Louisville*, 362 U.S. 199 (1960),

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the United States [Powell Committee Report], at 7 (August 23, 1989) ("[t]he fundamental requirement of a criminal justice system is fairness.").

the Court overturned a conviction because the charges against the defendant had no evidentiary support. The Court stated, "[I]t [is] a violation of due process to convict and punish a man without evidence of his guilt." *Id.* at 206 (footnote omitted). *See also Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process requires that certain indigent criminal defendants receive the assistance of a psychiatrist); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (granting writ of habeas corpus because the accused was denied a fair trial due to excessive publicity); *Turner v. Louisiana*, 379 U.S. 466 (1965) (violation of due process because two key witnesses were deputy sheriffs who doubled as bailiffs during the trial); *Mooney v. Holohan*, 294 U.S. 103 (1935) (conviction on the basis of knowingly perjured testimony denies due process); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (trial before a judge who has an interest in the matter violates the Due Process Clause).

The Due Process Clause of the Fourteenth Amendment guarantees a fundamentally fair trial to each person accused by the state of a crime. A state court can deny a defendant a fundamentally fair trial by violating procedures explicitly provided in the Bill of Rights and incorporated in the Fourteenth Amendment. In addition, a state can infringe an accused person's right to a fundamentally fair trial by failing to abide by procedures that are not explicit in the Constitution, but that are nevertheless fundamental to the fair administration of justice.

B. The character rule is fundamental to a fair trial.

Evidentiary rules that are deeply rooted in the common law tradition can be fundamental to a fair trial. *Brinegar v. United States*, 338 U.S. 160, 174 (1949). So it is

with the principle prohibiting the introduction of evidence of criminal disposition, commonly called the "character rule." The rule has been firmly and consistently applied since the middle of the seventeenth century. The character rule is embodied in Federal Rule of Evidence 404 and in section 1101 of the California Evidence Code. Every single state has adopted a similar or identical rule, either by statute or through case law. The rule also prevails in other common law countries. Violation of the character rule can deny a defendant due process of law.

The character rule "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (footnote omitted). Character evidence is always excluded, except where particularly probative to show intent, identity, malice, motive, *modus operandi* or an element of the offense. *See Spencer v. Texas*, 385 U.S. 554, 560-1 & n.7 (1967) (discussing evidence of prior crimes, a form of character evidence). Character evidence may also be introduced when the defendant makes it an issue, or when the state attempts to impeach the defendant's credibility. *Id.* Other than these circumstances, character evidence is not admissible; people are tried for what they do, not who they are. *See Boyd v. United States*, 142 U.S. 450 (1891) (overturning a murder conviction because court admitted evidence of several robberies that were not related to the murder charge).

The character rule is essential to a fair trial. To determine whether a rule is essential to a fair trial, the Court often examines the history of the rule and whether it is universally applied. In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court emphasized this principle, stating,

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Id. at 174; *see also In Re Winship*, 397 U.S. at 362, quoting *Brinegar*. Further, near universal adherence to a rule "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Winship*, 397 U.S. at 361-62, quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). For example, the Court in *Pacific Mutual Life Insur. Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032, 1041-43 (1991), found that imposing reasonable punitive damages does not violate the Due Process Clause because those damages are deeply rooted in Anglo-American law and are universally applied by state and federal courts. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy not protected by Due Process Clause because it is not deeply rooted in American jurisprudence).

The character rule is an essential attribute of Anglo-American jurisprudence; the rule has been around longer than our country. The character rule was firmly established in England by at least the middle of the seventeenth century. In *Hampden's Trial*, 9 How. St. Tr. 1053, 1103 (K.B. 1684), Justice Withins recalled a prior case in which the court forbade use of evidence of "any other forgeries, but that for which [the accused] was indicted." In *Harrison's Trial*, 12 How. St. Tr. 834 (Old Bailey 1692), the defendant was on trial for murder. A witness was called to testify about some prior wrongful act of the

defendant, but the Lord Chief Justice refused to allow the testimony, stating, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.* at 864. *See also Regina v. Oddy*, 169 Eng. Rep. 499, 502 (Cr.Cas.Res. 1851) (accused was on trial for possession of stolen property; as per Lord Chief Justice Campbell, evidence of defendant's possession of other stolen property was not admissible); S. M. Phillipps, *Law of Evidence* 170 (1824) (evidence of prior acts not admissible to show criminal disposition). A primary reason for this rule is to ensure that the accused is not found guilty merely because a jury might think that he or she is likely to have committed a crime. *Regina v. Oddy*, 169 Eng. Rep. at 502 ("evidence of the prisoner being a bad man, and likely to commit the offences there charged" is inadmissible).

Early American courts recognized the importance of the character rule. The Massachusetts Bay Colony's Superior Court of Judicature applied the rule in *Rex v. Doaks*, Quincy's Mass. Reports 90 (Mass. Super. Ct. 1763). Doaks was indicted for keeping a "Bawdy House." The court excluded evidence of former acts of lasciviousness, and of the defendant's "general ill Character." *Id.* at 91. The same principle was applied by American courts in the nineteenth century. *See Boyd*, 142 U.S. at 454-58; *Commonwealth v. Jackson*, 132 Mass. 16, 20 (1882) (Devens, J.); *Commonwealth v. Hardy*, 2 Mass. 302, 317 (1807) (Parsons, C.J.).

The character rule now prevails in every state and in the District of Columbia. Thirty-eight states have codified the common law character rule by adopting an evidentiary rule identical or similar to Federal Rule of Evidence

404.[2] These states are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.[3] The

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[2] Federal Rule of Evidence 404 provides:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] *See* Alaska Evid. Code § 404; Ariz. Evid. Code § 404; Ark. Ct. R. 404; Cal. Evid. Code § 1101 (West 1991); Colo. Evid. Code § 404; Del. R. Evid. 404; Fla. Evid. Code § 90.404; Haw. R. Evid.

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District of Columbia and the remaining twelve states, Alabama, Connecticut, Georgia, Illinois, Indiana, Maryland, Massachusetts, Missouri, New York, Pennsylvania, South Carolina, and Virginia, also prohibit the admission of character evidence to show criminal propensity, but have adopted this rule through case law.[4]

Other common law countries and territories have adopted the character rule. They include Australia,

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404; Idaho Ct. R. 404; Iowa R. Evid. 404; Kan. R. Civ. P. 60-447; Ky. R. Evid. 404; La. Code Civ. Proc. Ann. art. 404 (West 1990); Me. R. Evid. 404; Mich. R. Evid. 404; Minn. R. Evid. 404; Miss. R. Evid 404; Mont. R. Evid. 404; Neb. R. Evid. 404; Nev. Rev. Stat. Ann. § 48.045 (Michie 1986); N.H. R. Evid. 404; N.J. R. Evid. 47; N.M. Stat. Ann. § 11-404 (1978); N.C. Gen. Stat. § 8c-1, Rule 404 (1990); N.D. R. Evid. 404; Ohio R. Evid. 404; Okla. C. Civ. P. 2404; Or. R. Evid. 404; R.I. R. Evid. 404; S.D. R. Evid. 404; Tenn. R. Evid. 404; Tex. R. Evid. 404; Utah R. Evid. 404; Vt. R. Evid. 404; Wash. R. Evid. 404; W. Va. R. Evid. 404; Wis. R. Evid. 904.03; Wyo. R. Evid. 404.

[4] *See Artis v. United States*, 505 A.2d 52, 56 (D.C. App. 1986), *cert. denied*, 479 U.S. 964 (1986); *Anonymous v. State*, 507 So.2d 972, 973-74 (Ala. 1987); *State v. Holliday*, 159 Conn. 169, 268 A.2d 368 (1970); *Brown v. State*, 197 Ga. App. 155, 398 S.E.2d. 34 (1989); *People v. Kannapes*, 208 Ill. App. 3d 400, 567 N.E.2d 377, 380 (1990); *Penley v. State*, 506 N.E.2d 806, 808 (Ind. 1987); *Ross v. State*, 276 Md. 664, 669-70, 350 A.2d 680, 684 (1976); *Commonwealth v. Chalifoux*, 362 Mass. 811, 815-16 (1973); *State v. Clark*, 801 S.W.2d 701, 703 (Mo. 1991); *People v. Powell*, 543 N.Y.S.2d 818, 819, 152 A.D.2d 918 (1989); *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491, 497 (1988); *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631, 633 (1981); *Brooks v. Commonwealth*, 220 Va. 405, 407, 258 S.E.2d 504, 506 (1979).

Canada, England, Ireland, the Philippines, Puerto Rico, and the Virgin Islands.[5]

The rule against character evidence is thus essential to the very concept of justice in our country and in other countries that adhere to the common law tradition. The rule is vital to a fundamentally fair trial[6]

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[5] *See R. v. Knape*, 1965 V.R. 469, 472 (Vict. 1965); *Sweitzer v. The Queen*, 1 S.C.R. 949, 952-5 (Can. 1982); *Beggs*, 90 Crim. App. R. 430, 434-35 (Eng. 1990); *People v. Bond*, 1966 I.R. 214, 223 (Ir.C.C.A. 1966); *People v. Asinas*, 53 P.I. 59, 67-8 (Phil. 1929); P.R. Laws Ann. tit. 32, app. IV, rule 20 (1980); V.I. Code Ann. tit 5, § 887 (1967).

[6] Because the character rule has been adopted in every state and acknowledged by this Court, the retroactivity bar of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) has no possible application here. In *Teague*, the Court held that a "new rule" will not be announced for the first time on habeas corpus unless the absence of the rule "undermine[s] the fundamental fairness that must underlie a conviction or seriously diminish[es] the likelihood of obtaining an accurate conviction." *Id.* at 310, 315. A new rule is one which "breaks new ground or imposes a new obligation upon the States or the Federal Government." *Id.* at 301 (citations omitted).

First, the prohibition against the introduction of propensity evidence does not break new ground; it has been consistently applied for hundreds of years and has been adopted in every state. Moreover, contrary to a claim in one of the *amicus curiae* briefs (Brief of Criminal Justice Legal Foundation at 28-30), this Court has recognized the character rule. *See, e.g., Boyd v. United States*, 142 U.S. 450 (1892). Second, the rule fits within both exceptions to *Teague*. Absence of the character rule would undermine the fundamental fairness of a trial and would diminish the likelihood of obtaining an accurate conviction.

It is worth noting that neither the petitioner nor the United States claim that *Teague v. Lane* has any relevance to this case.

C. Introduction of propensity evidence can make a trial fundamentally unfair.

All of the parties agree on the legal standard that governs this case: a person accused of a crime is denied due process by the trial court's "failure to observe that fundamental fairness essential to the very concept of justice . . . [where] the absence of that fairness fatally infect[s] the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236 (1941); Petitioner's Brief at 42 (quoting *Lisenba*); Brief for the United States at 12-13 (same). Propensity evidence can fatally infect a trial with unfairness. The State agrees with this point as well: "[T]he improper introduction of evidence or an incorrect jury instruction might in some cases, result in the denial of due process . . . ." Petitioner's Brief at 14-15.[7] This is just such a case.

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[7] Never has this Court denied that a violation of the character rule can deprive an accused of fundamental fairness and due process. For example, in *Spencer v. Texas*, 385 U.S. 554 (1967), this Court held that the introduction of certain documentary evidence of prior criminal convictions did not result in fundamentally unfair trials. Character evidence was introduced in three separate trials to enhance the defendants' punishments, based upon an admittedly proper state recidivist statute. *Id.* at 557. The juries in those cases were specifically instructed that the prior act evidence could be considered only with respect to punishment, and not for proof of guilt. *Id.* at 559. In the Supreme Court, the petitioners argued that the juries were not capable of following the instructions; the petitioners claimed that conducting the guilt and punishment phases of the trials together (rather than bifurcating the two stages) made their trials fundamentally unfair. *Id.* at 563. This Court ruled that the evidence was admitted for a proper purpose and that the juries were presumed to have followed the

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This Court has long recognized that character evidence can inflame jurors' passions, result in unfair surprise, and unfairly prejudice a person accused of a crime. In *Boyd v. United States*, 142 U.S. 450 (1892), the Court held evidence of other crimes inadmissible. As the first Justice Harlan wrote for the Court,

> Proof of [other crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules proscribed by law for the trial of human beings . . . .

Id. at 458. In *Michelson v. United States*, 335 U.S. 469, 475-76 (1948), the Court held that "[t]he state may not show defendant's prior trouble with the law . . . not . . . because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (Footnote omitted). *See also Spencer v. Texas*, 385 U.S. 554, 570 (1966) (Warren, C.J., dissenting) ("the use of prior-convictions evidence in these cases is fundamentally at odds with traditional notions of due process . . . because it needlessly prejudices the accused without advancing any legitimate interest of the State" *Marshall v. United States*, 360 U.S. 310, 312 (1959) (reversing a conviction because the jury was exposed to news

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instructions. *Id.* at 566. Thus, *Spencer* merely represents one instance in which a form of character evidence was properly introduced.

reports of the defendant's prior convictions, "evidence of a character which the trial court ruled was so prejudicial it could not be directly offered into evidence").[8] Given its potential to cause extreme prejudice, it is clear that propensity evidence can fatally infect a state criminal defendant's trial with unfairness.

Accordingly, the courts of appeals recognize this potential for prejudice. The Third, Fifth, Sixth, Seventh and Eleventh Circuits, in addition to the Ninth Circuit, have properly granted habeas corpus relief where state evidentiary errors have resulted in fundamentally unfair trials. *See Bisaccia v. New Jersey*, 623 F.2d 307 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980) (reversing the denial of a habeas corpus petition because the prejudicial effect of evidence might have risen to such a magnitude as to deny fundamental fairness); *Panzavecchi v. Wainwright*, 658 F.2d 337, 341 (5th Cir. Unit B 1981) (granting habeas corpus petition because prejudice from character

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[8] Benjamin Cardozo, writing as Chief Justice of the New York Court of Appeals, framed the issue rather well:

> There may be some cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of a milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." Wigmore, *Evidence* vol. 1, § 194, and cases cited.

People v. Zackowitz, 254 N.Y. 192, 198, 172 N.E. 466, 468 (1930).

evidence "rose to such a level as to make petitioner's trial fundamentally unfair and in violation of the Fourteenth Amendment"); *Walker v. Engle*, 703 F.2d 959 (6th Cir.), *cert. denied*, 464 U.S. 951 (1983) (granting petition for writ of habeas corpus because evidentiary error resulted in fundamentally unfair trial); *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989) (granting habeas corpus relief because prejudical effect of evidence so outweighed probative value that the result was a denial of due process); *Osbourne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing the denial of habeas corpus petition because prejudical effect of evidence might have risen to such a magnitude as to deny fundamental fairness).

As these cases demonstrate, the circuits follow the basic test described in *Lisenba v. California*. There is no disarray among the circuits in the application of the *Lisenba* standard. The only question for the district courts and the courts of appeals is whether, on the facts of each individual case, an accused person was denied a fundamentally fair trial.[9]

Of course, federal courts do not, and should not, remedy every evidentiary error in every state criminal proceeding. That much was made clear in *Spencer v. Texas*, 385 U.S. 554, 562 (1967) (noting that federal courts do not

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[9] The Ninth Circuit has no difficulty recognizing that state court errors only rise to the level of a constitutional violation in very unusual circumstances, such as the present case. *See Jammel v. Van De Kamp*, 926 F.2d 918 (9th Cir. 1991) (denying petition for writ of habeas corpus because error did not result in a fundamentally unfair trial); *Kealohapauole v. Shimoda*, 800 F.2d 1463 (9th Cir. 1986), *cert. denied*, 479 U.S. 1068 (1987) (same); *Butcher v. Marquez*, 758 F.2d 373 (9th Cir. 1985) (same).

promulgate state rules of procedure). But, in the rare event that an egregious evidentiary error denies the accused a fundamentally fair trial, the federal court must remedy the constitutional violation.

II. Mr. McGuire Was Denied a Fundamentally Fair Trial, and The Court of Appeals Properly Granted Relief.

A. The court of appeals granted relief because of a violation of the United States Constitution.

California, like every other of the United States, has formulated its own version of the character rule. California's version of the rule is contained in section 1101 of the California Evidence Code. That California has codified its own version does not, however, convert the issue of admission of character evidence into solely a question of state law. If the admission of propensity evidence renders a trial fundamentally unfair, federal rights have been denied. The Court articulated this principle in *Lisenba v. California*, 314 U.S. 219 (1941), stating,

> The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such [evidentiary] rule as she elects, whether it conform[s] to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence.

Id. at 236.

Furthermore, the United States Constitution is the "supreme Law of the Land; and the Judges in every state [are] bound" by it. U.S. Const. art. VI, cl.2. Thus, a state

law can never preempt the Constitution. Accordingly, although states are free to enact procedural rules to protect constitutional rights, if, in a particular case, the law fails to provide due process, the accused may still assert a violation of the underlying right.

In this case, the court of appeals found a violation of that underlying constitutional right, and not merely an error of state law. The petitioner asserts that the court of appeals "misinterpreted" state law. *See* Petitioner's Brief at 19-24. This argument misperceives the court's opinion. To be sure, the federal court of appeals cited state law in discussing "battered child syndrome" evidence and the character rule. *McGuire v. Estelle*, 902 F.2d 749, 753-54 (9th Cir. 1990); J.A. 107-09. The court also cited Federal Rules of Evidence 401 and 404. *Id.* Simply because the court looked to familiar signposts to articulate the character rule does not indicate, however, that the court's decision hinged on a strict interpretation of those cited rules. The court of appeals unmistakeably concluded that a constitutional violation had occurred: "[T]he aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered [Mr. McGuire's] trial arbitrary and fundamentally unfair." *Id.*, 902 F.2d at 753; J.A. 106.

Under *Lisenba* and the Supremacy Clause, the federal court acted within its authority and as required by the Constitution in determining that the admission of evidence of alleged prior conduct of Mr. McGuire, although held admissible by state courts, violated Mr. McGuire's right to a fair trial.

B. Admission of propensity evidence denied Mr. McGuire a fundamentally fair trial.

Mark McGuire was convicted because pure propensity evidence was introduced at his trial. The prosecutor used two types of propensity evidence in the trial, and neither type was relevant to any proper issue in the case. First, the prosecutor introduced testimony of other injuries sustained by Tori McGuire. This evidence was unnecessary to establish lack of accident, because no defense of accident was raised. Furthermore, the state's own expert was prepared to testify about "battered child syndrome" and the lack of an accident, without relying at all upon the previous acts or injuries. The prosecutor also introduced inflammatory evidence of Mr. McGuire's supposed violent disposition. As if this were not enough, the prejudice caused by this propensity evidence was exacerbated by the trial judge's instructions to the jury. The trial judge told the jury that it could infer that because Mr. McGuire supposedly had a violent disposition, he was the person who killed Tori. The prosecutor's use of propensity evidence in this case significantly departed from historical practice and denied Mr. McGuire a fundamentally fair trial.

The first category of propensity evidence, the category that has received the most attention in this case, is the evidence of prior injuries. None of this evidence was necessary to establish "battered child syndrome." Dr. Levine made her diagnosis before she was even aware of the prior rib injuries; those prior injuries merely "confirmed" her diagnosis. [RT 92]. There was no challenge to the validity of the "battered child syndrome" diagnosis,

and hence there could be no need to reinforce the diagnosis by reference to injuries that would only serve to prejudice Mr. McGuire.

Nor was this evidence introduced to show absence of an accident. The prosecution, not the defense, introduced the alleged prior statement about accidental harm – that the baby fell off the couch. Surely the state cannot be permitted to raise the possibility of an accident and then introduce prejudicial propensity evidence to rebut the issue the prosecution itself has raised. If the Court has any doubt about the real reason why this evidence was admitted, the Court need not look beyond the prosecutor's own statements to the trial judge:

> MR. PLATT [Prosecutor]: The jury can infer[,] from the existence of the broken rib[,] identification, it is like you may not see the brick layer making a wall, lay the first brick, but if you see him laying the thirty seventh, it is a fair inference that he is the one who laid the first one, the fifth one, the fifteenth one, especially if there is no one else around.

[RT 647; J.A. at 34].[10]

Furthermore, the petitioner cannot circumvent the character rule merely through the incantation that the prior injury evidence was relevant to a medical diagnosis. The diagnosis must itself be tied to a proper issue in the case. No one except the prosecution ever suggested at trial that Tori McGuire died by accident. Given that this

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[10] The prosecutor had previously denied that this evidence was relevant to identity. He stated that "[w]e do not maintain that the battered child syndrome addresses itself to the identity of the perpetrator. We maintain as a diagnostic devise [sic] period. I am not looking to identify anybody through risk factor testimony." [RT 70; J.A. at 16].

issue was uncontested, even the "battered child syndrome" diagnosis had limited relevance.

The second category of propensity evidence was the testimony about Mr. McGuire's alleged prior acts and threats. The prosecution went so far as to establish that Daisy McGuire had once sought information about a battered women's shelter, [RT 499], and that she would not go home with Mr. McGuire on one occasion until he promised in writing "to treat Daisy good" and "to stop all bad habits and be a responsible husband." [RT 361-62]. Defense counsel repeatedly objected, telling the trial judge that this category of evidence improperly went to disposition. [RT 234-40]. Indeed, the prosecutor's own statements demonstrate that the evidence was offered to prove that Mr. McGuire had a violent disposition and that, as between Mr. and Mrs. McGuire, he was more likely to have killed Tori. The prosecutor stated to the trial court, in urging that this category of propensity evidence be admitted:

> MR. PLATT: [H]is violent propensity with respect to the family setting with[in] which this crime occurred are germane to show he and not Daisy is the aggressor. Daisy is the passive, the typically passive parent . . . Mr. McGuire is the aggressor. He did it. Not Daisy, not some mysterious Mexican. We are entitled to show that just as we are entitled to show previous injuries to the child . . . .

[RT 237]. There could be no proper purpose for this evidence. This was pure propensity evidence, for the testimony was relevant to identity only through the forbidden link of criminal disposition.

The judge's instructions to the jury magnified the prejudicial effect of this propensity evidence. The charge

to the jury was based upon a pattern instruction, *California Jury Instructions – Criminal* [CALJIC] 2.50 (4th ed. 1979). The jury was told that it could find Mr. McGuire guilty if it logically concluded that he committed the other acts. *McGuire v. Estelle*, 902 F.2d at 755, J.A. at 112. Hence, as the court of appeals found, "[t]he trial court *instructed* the jury to use that [propensity] evidence in the most improper way possible." *Id.*, 902 F.2d at 754, J.A. at 110 (emphasis in original). The pattern jury instruction has since been corrected, and the offending paragraph has been entirely deleted.[11] Of course, while California has amended the faulty pattern instruction, the correction comes too late to help Mr. McGuire.

The propensity evidence was introduced without any proper purpose, which is a clear departure from the historical common law character rule. Absent the evidence, Mr. McGuire would not have been convicted. Without the improper testimony, the case against Mr. McGuire was weak: no eyewitnesses testified that Mark McGuire inflicted the fatal blows, and Daisy McGuire confessed at trial to hitting Tori shortly before the child's death. The court of appeals wrote that "only the barest threads connect McGuire to the crime." *McGuire v. Estelle*, 902 F.2d at 755, J.A. at 113. The jury was instructed to

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[11] CALJIC 2.50 has been revised several times since Mr. McGuire was tried. The comments to an intermediate revision explain that the offending language was deleted in response to a case from the California Supreme Court, *People v. Tassell*, 36 Cal.3d 77, 679 P.2d 1 (1984). *See CALJIC Pocket Part For Fourth Edition* § 2.50, Comments (January 1987). The new instruction is CALJIC 2.50 (5th ed. 1988). It is carefully drafted to prevent a jury from convicting an accused person on the basis of pure propensity evidence.

consider the character evidence in the most harmful fashion. Hence, the effect of the improper propensity evidence must have been "to so overpersuade [the jury] as to prejudge one with a bad general record and deny him a fair opportunity to defend against [the] charge." *Michelson v. United States*, 335 U.S. at 475-76. Under the circumstances of this case, the absence of fundamental fairness "fatally infected" the trial, within the meaning of *Lisenba v. California*. The State denied Mr. McGuire a fundamentally fair trial, and therefore violated the Due Process Clause.

III. Habeas Corpus Is The Proper Remedy For The Denial of A Fundamentally Fair Trial.

The court of appeals granted Mr. McGuire's petition for writ of habeas corpus, finding that he was denied a fundamentally fair trial. At its heart, the debate in this case is not about the proper role of habeas corpus, for this Court has repeatedly held that federal habeas corpus will remedy the denial of fundamental fairness in a state criminal trial. It is important to make clear that the use of the writ in this case is fully in accord with a settled function of habeas corpus, which is protecting against arbitrary imprisonment and unfair trials.

Habeas corpus *ad subjiciendum* – the "Great Writ" – has traditionally served as the basic mechanism to challenge unlawful confinement. At common law it commanded the custodian to produce the body of a prisoner, together with the reasons for his or her detention, and to "submit to, and receive, whatsoever the judge or court awarding the writ shall consider in that behalf." 3 W. Blackstone, *Commentaries on the Laws of England* 131 (1791). In the seventeenth century, Parliament repeatedly

affirmed the role of habeas corpus. Parliament passed the Habeas Corpus Act of 1641, 16 Car. I, ch. X, par. vi (the court may issue a writ demanding that the custodian "certifie the true cause of such his deteinor or imprisonment;" the court must then "proceed to examine and determine whether the cause of such commitment . . . be just or legall or not and shall thereupon do what to justice shall appertaine") as well as the Habeas Corpus Act of 1679, 31 Car. II, ch. II.

English courts granted writs of habeas corpus in appropriate circumstances. In the celebrated *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670), habeas corpus was utilized to free former jurors from custody. A judge had held the jurors in contempt after they returned not guilty verdicts in the tumultuous and unlawful assembly trial of William Penn and William Mead. *Id.* at 1007. The jurors sought release on habeas corpus. The court noted that "[t]he writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been again the law deprived of it." *Id.* The jurors' imprisonment was deemed to be without cause, *id.* at 1009, and they were discharged from custody.

The role and importance of habeas corpus was recognized in the earliest days of our nation. Habeas corpus is discussed in *The Federalist*.[12] The writ is embodied in the

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[12] *See* No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1961) ("[A]rbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act . . . both . . . are provided for in the most ample manner in

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United States Constitution. U.S. Const. art. I, § 9, cl. 2 (the Suspension Clause). The Judiciary Act of 1789 only gave the federal courts power to grant writs of habeas corpus for federal prisoners. *See* Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82; *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845). However, Congress soon realized that our country could not function as a modern nation and speak with a single voice unless federal habeas corpus was extended to state prisoners. Thus, Congress gradually made federal habeas corpus available to persons in state custody, enacting two statutes in the early part of the nineteenth century,[13] and then, during Reconstruction, passing the Habeas Corpus Act of 1867. That Act made federal habeas corpus generally available to state prisoners who are in custody in violation of the Constitution.[14]

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the plan of the convention"); *id.* No. 84, at 511-12 (A. Hamilton) ("The establishment of the writ of *habeas corpus*, the prohibition of [*ex post facto* laws and titles of nobility] are perhaps greater securities to liberty and republicanism than any [provision of the New York constitution]"; habeas corpus is a remedy for the "fatal evil" of "arbitrary imprisonments").

[13] Congress passed The Act of March 2, 1833 ("The Force Act"), ch. 57, § 7, 4 Stat. 634, so that federal habeas corpus would be available to federal tariff collectors imprisoned by state authorities. W. Duker, *A Constitutional History of Habeas Corpus* 187 (1980). The Act of August 29, 1942, 5 Stat. 539, was passed to permit the federal government to intercede in a state criminal prosecution of a foreign agent. *Id.* at 188-89. *See also* J. Liebman, *Federal Habeas Corpus Practice and Procedure* 7 (1988).

[14] Act of February 5, 1867, ch. 28, 14 Stat. 385. The first section of the Act provides that federal courts "shall have power to grant writs of habeas corpus in all cases where any

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In passing the 1867 Act, Congress gave state prisoners complete access to the remedy of federal habeas corpus. Representative Lawrence introduced the bill in the House and stated that it would "enlarge" habeas corpus "and make the jurisdiction of the [federal] courts . . . coextensive with all the powers that can be conferred upon them." He called it "a bill of the largest liberty . . . ." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866) (statement of Representative Lawrence). Senator Trumbull, who introduced the bill in the Senate, stated,

> [A] person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

Cong. Globe, 39th Cong., 1st Sess. 4229 (1866) (statement of Senator Trumbull). In the earliest case under the 1867 Act, this Court held that "[The Act] is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867).

True to an historical role of the writ and consonant with Congress's mandate that federal courts use habeas

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person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . . " The Act is codified, as amended, at 28 U.S.C. sections 2241(c)(3) and 2254(a).

corpus to ensure that federal rights are enjoyed by all, this Court has steadfastly granted petitions for writs of habeas corpus on behalf of defendants denied a fundamentally fair state criminal trial. In *Moore v. Dempsey*, 261 U.S. 86 (1923), five men convicted of murder in the state courts of Arkansas sought a federal writ of habeas corpus. They alleged that their state trials were "only a form," because they were convicted under mob pressure. *Id.* at 87. This Court reversed the dismissal of their habeas corpus petitions, and remanded for the district court to determine whether they were denied fair trials. *Id.* at 92. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a doctor accused of murdering his wife petitioned for habeas corpus relief from his state conviction in the state courts of Ohio. He alleged that he was deprived of his constitutional right to a fair trial due to massive, pervasive and prejudicial pretrial publicity. *Id.* at 335. This Court agreed, *id*, and granted Mr. Sheppard's petition for writ of habeas corpus. *Id.* at 363. *See also Irvin v. Dowd*, 366 U.S. 717 (1961) (granting habeas corpus where pretrial publicity resulted in an unfair trial in violation of the Fourteenth Amendment).

This Court has also repeatedly granted petitions for writs of habeas corpus where state criminal proceedings have violated rules, essential to the fair administration of justice, which are explicitly enumerated in the Bill of Rights and made applicable to the states through the Fourteenth Amendment. *See, e.g., Ford v. Wainwright*, 477 U.S. 399 (1986) (reversing denial of habeas corpus petition and remanding to determine whether an incompetent prisoner is to be executed, in violation of Eighth and Fourteenth Amendments); *Malloy v. Hogan*, 378 U.S. 1 (1964) (reversing denial of state habeas corpus petition

for violation of Fifth and Fourteenth Amendment right against self-incrimination); *Chessman v. Teets*, 354 U.S. 156 (1957) (reversing denial of habeas corpus petition because state violated Sixth and Fourteenth Amendment right to counsel).

The petitioner claims that this is not an appropriate case for habeas corpus, offering what is essentially a policy argument. The petitioner claims that habeas corpus is a source of friction between state and federal courts and that some state judges do not like having state convictions considered by federal courts. *See generally* Petitioner's Brief at 38-41. Any such friction, if it even exists at all,[15] is entirely beside the point.

This Court cannot abdicate its constitutional and statutory duties merely to avoid upsetting state judges. It may be true that judges in any system, state or federal, do not relish having their decisions considered by a subsequent court or by this Court. Nevertheless, we are a society governed by the rule of law. Among a judge's responsibilities is submitting his or her decisions to scrutiny by others. Under the Supremacy Clause, the Constitution is the law of the land. The federal courts are the final arbiters of federal law. Congress has spoken: federal

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[15] As Justice Blackmun wrote for the Court in *Rose v. Mitchell*, 443 U.S. 545 (1979),

> The confirmation that habeas corpus remains an appropriate vehicle by which federal courts are to exercise their Fourteenth Amendment responsibilities is not likely further to increase " 'friction between our federal and state systems of justice, [or impair] the maintenance of the constitutional balance upon which the doctrine of federalism is founded.' "

Id. at 562, quoting *Stone v. Powell*, 428 U.S. 465, 491 n. 31 (1979) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

courts must grant habeas corpus relief if a state prisoner is "in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a).[16] This role of the federal courts is especially important where, as here, the petitioner has been denied a fundamentally fair trial, for "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984); *see also Wainwright v. Sykes*, 433 U.S.

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[16] The existence of habeas corpus in no way disparages the abilities of our state court judges. Our federal courts have the final say in matters of federal law, just like state courts are the final authorities on matters of state law. The Habeas Corpus Act of 1867 simply allows the federal courts to remedy violations of federal rights, a role that this Court has repeatedly filled. In addition, the Act reflects a congressional preference for careful review of claimed violations of fundamental rights; it must be agreed that adding another layer of review increases the likelihood that constitutional error will be found. *See McCleskey v. Zant*, ___ U.S. ___, 59 U.S.L.W. 4288, 4295 (1991) ("[t]he federal writ of habeas corpus overrides all these considerations [of finality and comity], essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition"); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (despite any concerns of comity, "[w]e nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard . . . "); *see also Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) ("collateral review will frequently be the only means through which an accused can effectuate [certain constitutional rights]"); *Jackson v. Virginia*, 443 U.S. 307, 322 (1979) ("Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1045 (1977) ("redundancy fosters greater certainty that constitutional rights will not be erroneously denied").

72, 96-7 (1977) (Stevens, J., concurring). It would be remarkable for this Court, or any federal court, to ignore a fundamental injustice merely to avoid some imagined discomfort to a state court judge.

The court of appeals' decision in this case is entirely consistent with an historical and central role of habeas corpus. Through the ages, habeas corpus has been used to free prisoners from arbitrary and unlawful confinement. Mr. McGuire's imprisonment is arbitrary and unlawful; he was denied a fundamentally fair trial due to the introduction of evidence of a type universally condemned by common law jurisdictions. Mr. McGuire's habeas corpus petition was properly granted.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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